

ATTACHMENT H

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10 **BEFORE THE BOARD OF ADMINISTRATION**
11 **CALIFORNIA PUBLIC EMPLOYEES RETIREMENT SYSTEM**
12 **STATE OF CALIFORNIA**

13 In the Matter of the Appeal of Final
14 Compensation:

15 DARRYL HURT,
16 AND
17 CITY OF RIVERSIDE

18 Respondents.

Agency Case No. 2012 0190

OAH No. 2014090777

19 In the Matter of the Appeal of Final
20 Compensation:

21 TIMOTHY BACON,
22 AND
23 CITY OF RIVERSIDE

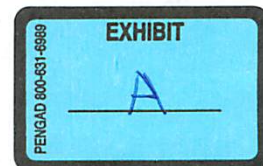
24 Respondents.

Agency Case Nos. 2012 0191

OAH No. 2014090781

RESPONDENT'S CLOSING ARGUMENT

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26 RESPONDENT'S CLOSING ARGUMENTS

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RESPONDENT'S ARGUMENTS TO GRANT APPEAL

I. INTRODUCTION

Respondents Darryl Hurt and Tim Bacon ("Respondents") were denied promotions to the position of Police Captain in substantial part based on their First Amendment speech and union activities. As part of a settlement with the City of Riverside, Respondents effectively received the promotions they had been unlawfully denied. Respondents' ensuing pay increases were consistent with publically available pay schedules for the position of Captain at the City of Riverside, and Respondents worked as Captains while on paid administrative leave for a substantial amount of time before they retired. They would have been Captains sooner but for unlawful retaliation. And there is no reason that the increases in "payrate" to the Captain level they received should not be included in the calculation of their final compensation.

Moreover, CalPERS should now be estopped from claiming that Respondents are not entitled to Captain's retirements. CalPERS was asked whether Respondents' retirement benefits would be calculated at the Captains' pay level *before* the settlement agreement that has led the parties to this point was finalized. CalPERS did not state that this compensation was not pensionable then. A CalPERS employee represented to the City's counsel, attorney and current State Senator Richard Roth, that under the circumstances Respondents would receive a Captain's retirement. And naturally and reasonably, Respondents relied on those representations in deciding to retire when they did, and in planning what their retirement income would be. Members reasonably give credence to representations of CalPERS analysts. CalPERS must therefore be held accountable for its own conduct, and its decision in this case must accordingly be reversed.

II. ISSUES PRESENTED

Whether compensation in the form of a "special salary adjustment" pursuant to a settlement agreement between Respondents Hurt and Bacon and Respondent City can be included in the calculation of Respondent's Hurt and Bacon's final compensation.

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III. STATEMENT OF FACTS

Respondents Darryl Hurt and Timothy Bacon were employed by the City of Riverside Police Department for over 25 years. (RT Hearing 14:11; RT Hearing 68:19). Both served honorably, receiving awards and commendations, and eventually reached the rank of lieutenant. (RT Hearing 14:23-25; RT Hearing 69:15-17). While serving as lieutenants, a management level position, they became involved in the management association's political action committee. As a result of this involvement, both became targets of retribution for those in power at the city. This came in the form of repeated denials when Respondent's sought promotions, even though both were well-qualified and veteran lieutenants. (RT Hearing 18:14-17; RT Hearing 71:14-19).

Respondents sued the City of Riverside in federal court for, amongst other things, retaliation and violation of the right to engage in political activities. (Exhibit 5). The parties eventually reached a settlement agreement. As part of this agreement, Respondents were promoted to the rank of captain, were to receive at least 12 months of pay at the top-step captain rate prior to retirement, and retire from service when each became eligible. (Exhibit 7). If there had been no retaliation and Respondents were promoted to Captain in the normal course, they could have retired with approximately two to three years worked at the Captain rank in 2010.

The City, through its designated representative in the civil case, Attorney and now sitting State Senator, Richard Roth, consulted with CalPERS about whether the way the agreement was structured to determine whether Respondents would receive Captain's level retirements. (RT Hearing 88:1-90:9) Senator Roth was informed by the CalPERS representative that the settlement agreement would guarantee and that Respondents would receive retirement benefits as captains. (RT Hearing 90:1-9). The pay they received at the Captain's level, Roth was ensured, would be factored into their retirement compensation. (RT Hearing 90:10-17) Roth relayed this information to Respondents. Respondents would not have accepted the deal in the civil case, nor would have they retired when they did, if they were told the pay they received as Captains was not going to be pensionable. (RT Hearing 26:18-23; 82:1-6.) Based on the representations of the CalPERS official, Respondents elected to accept the City's offer.

1 The City paid Respondents as captains for several months. (Exhibits 8 & 9). Because of
2 the obviously strained relationship between Respondents and the City, the City placed both on
3 administrative leave until each was eligible for retirement. (Exhibit 7). Once eligible,
4 Respondents filed the appropriate paperwork with CalPERS and retired. It was only after they
5 retired that Respondent's learned that CalPERS was acting contrary to the assurances it provided
6 the City by now claiming that Respondents were only entitled to lieutenant level retirement
7 benefits. (Exhibits 3 & 4). Respondents have been detrimentally harmed by receiving a lower
8 level of retirement benefits than they were promised. Respondents ordered their affairs with the
9 reasonable expectation of a certain level of compensation in retirement that never materialized.

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11 **IV. ARGUMENT**

12 **A. RESPONDENTS ARE ENTITLED TO RECEIVE RETIREMENT BENEFITS**
13 **BASED ON THEIR FINAL COMPENSATION AS TOP-STEP POLICE CAPTAINS**
14

15 **1. Respondents' payrate was commensurate with that of a top-step police**
16 **captain prior to their retirement, as required by California Public Employment**
17 **Retirement Law**

18 Respondents are entitled to receive retirement benefits based on their "final
19 compensation." An employee's "final compensation" is a "function of the employee's highest
20 'compensation earnable' by a member during the three consecutive years of employment
21 immediately preceding the effective date of retirement..." Prentice v. Board of Admin.,
22 California Public Employees' Retirement System (2007) 157 Cal.App.4th 983, 989.

23 California Government Code Section 20636(a) provides, "[c]ompensation earnable" by a
24 member means the payrate and special compensation of the member, as defined by subdivisions
25 (b), (c), and (g), and as limited by section 21752.5.

26 Under section 20636, subdivision (b)(1), "payrate" means the normal monthly rate of pay
27 or base pay of the member paid in cash to similarly situated members of the same group or class
28 of employment for services rendered on a full-time basis during normal working hours, pursuant

1 to publicly available pay schedules. "Payrate," for a member who is not in a group or class,
2 means the monthly rate of pay or base pay of the member, paid in cash and pursuant to publicly
3 available pay schedules, for services rendered on a full-time basis during normal working hours,
4 subject to the limitations of paragraph (2) of subdivision (e).

5 Section 20636(e)(1) provides that, as used in this part, "group or class of employment"
6 means a number of employees considered together because they share similarities in job duties,
7 work location collective bargaining unit, or other logical work related grouping. One employee
8 may not be considered a group or class.

9 In Molina v. Board of Administration of California Public Employees' Retirement
10 System, the pensioner filed a wrongful termination suit against his public agency employer and
11 ultimately reached a settlement agreement wherein the agency paid Molina \$875,000. (2011) 200
12 Cal.App.4th 53, 56. The agreement, however, did not characterize the payment, e.g. "as 'back
13 pay' or 'tort damages.'" *Id.* Molina argued that \$200,000 of the settlement payment should be
14 considered back pay for his final year of employment with the city. *Id.* at 58.

15 In Molina, the court also summarized the above rules as they relate to California PERL,
16 "a participants' specific pension benefit depends on 'final compensation,' which will not
17 increase without a raise in 'payrate' or special compensation." *Id.* at 66. Thus, where there is
18 such an increase, that increase should be included in the member's pension benefits.
19 Respondents Hurt and Bacon were compensated as top-step police captains from the date of the
20 settlement agreement to the time that each retired from service. (RT Hearing 77:11-78:4).

21 Respondents did not receive any preferential treatment or special benefits package, e.g. a
22 so-called "golden parachute." Instead, they were merely compensated at the same rate as the rest
23 of the top-step captains at the police department. Not only is this inline with the requirement of
24 section 20636(b)(1) as is relates to the "payrate" of similarly situated employees, but it also
25 meets the requirement of being "paid in accordance with a 'publicly available pay schedule for
26 services rendered on a full time basis during normal working hours.'" Molina, 200 Cal.App.4th
27 at 67. (Petitioner's Exhibits 13 & 14 showing pay at Captain's Rate)

28

1 In Molina, the court relied heavily on the California Supreme Court's reasoning and
2 holdings in Ventura County Deputy Sheriffs' Assn. v. Board of Retirement. Specifically, the
3 court quoted Ventura and its holding that it is "plainly clear that an individual's pay will not
4 count towards 'compensation earnable' unless it qualifies as either 'payrate' or 'special
5 compensation.'" *Id.* at 68.

6 As argued above, however, the salaries received by Respondents must count towards
7 their "compensation earnable" because they do qualify as "payrate." Specifically, the amounts
8 received by Respondents were the same as those paid to similarly situated employees and were
9 paid in accordance to a publicly available pay schedule. (RT Hearing 146:1-147:11)

10 In Molina, the court also determined that in order to Molina to qualify for retirement
11 benefits based on a "\$200,000 final compensation" he would need to have been reinstated into a
12 position whose publicly available pay scale was \$200,000. *Id.* Molina, however, was only
13 reinstated for a single day at his normal monthly pay rate. *Id.* Unlike Molina, Respondents never
14 actually separated from the police department until they retired. Instead, the Respondents
15 continued to work as police lieutenants as the lawsuit between Respondents and the City was
16 litigated and, after the settlement agreement was reached, both were placed on administrative
17 leave on which they performed the same duties that Captain's would perform on Administrative
18 Leave. (Exhibit 7.)

19 Once the settlement agreement was reached, Respondents received pay at the rate of a
20 top-step captain. (Exhibit 8). Moreover, while on administrative leave, Respondent Hurt was
21 subpoenaed for, and attended, court. (RT Hearing 52:23-24). Respondent Hurt also received
22 several telephone calls from other department employees who sought guidance or instructions on
23 projects or matters of which Hurt had been in charge. (RT Hearing 53:3-11). Additionally, he
24 maintained all of his police powers and had possession of his department identification and his
25 duty firearm. (RT Hearing 59:4-8).

26 Respondent Bacon also testified that he performed several work tasks while on
27 administrative leave. (RT Hearing 115:15-18). Specifically, Respondent Bacon, who spent years
28

1 investigating criminal street gangs, was asked to write a letter opposing the release of a gang
2 member who had been convicted of murder from state prison. (RT Hearing 115:20-116:8)

3 Captains, like other employees, can be placed on administrative leave, or any other type
4 of leave of absence. It does not mean that they cease to be Captains. Nor is there any
5 prohibition against promoting employees while they are on a leave of absence or against placing
6 employee on leave of absence after promoting them.

7 Thus, it is clear that Respondents were in the captain's position for a significant amount
8 of time before they separated from employment, received pay commensurate with those
9 positions and performed duties as needed by the department and courts. These facts clearly form
10 a legal basis for the assertion that they are entitled to pension benefits as captains.

11 The court in Molina also held that when looked at as a whole, the Government Code
12 sections cited above "make it clear that the settlement proceeds cannot, as a matter of law, be
13 utilized to increase Molina's final compensation for purposes of calculating his pension benefits.
14 *Id.* at 67.

15 Here, unlike Molina, Respondents do not contend that any portion of the funds paid
16 pursuant to their settlement agreement with the City should be calculated into their pension
17 benefits. Instead, Respondents are arguing that as part of their agreement with the City, they
18 were promoted to the rank of captain and are thus entitled to the retirement benefits of a top-step
19 captain. (RT Hearing 24:10-22). There is no need to try and determine which portion of what
20 funds should be included in their retirement calculation; it is only necessary to look at
21 Respondent's compensation at the time they retired from the police department.

22 Merely because the promotion to captain was included as part of a settlement agreement
23 between Respondents and the City should not allow their captain salaries to be excluded from
24 their retirement formula. Promotions can be made, or not made, for political reasons. A
25 promotion of a less qualified candidate because he is friends with the Chief, or because he is
26 favored by the City Council, for instance, is no less a valid promotion for pension purposes than
27 a promotion of the most qualified candidate. Nor is there any requirement that City's or
28 County's use Captain's or any other employee in an efficient manner. So long as an employee

1 performs the duties assigned to them and is paid commensurate with the level of the higher rank
2 for less than a *de minimus* period of time, they should be entitled to a retirement reflecting the
3 pay increase.

4 The rule from Molina should be interpreted as requiring settlement proceeds to be
5 excluded from CalPERS retirement formulas only where they are awarded in such a manner as to
6 not meet the requirements of compensation earnable. As discussed throughout this section,
7 Respondents were being paid commensurate with other captains at the department and are thus
8 entitled to the same retirement benefits.

9 Section 20630 defines "compensation" as the remuneration paid out of funds controlled
10 by the employer in payment for the member's services performed during normal working hours
11 OR for time during which the member is excused from work because of holidays, sick leave,
12 industrial disability leave, vacation, compensatory time off or leave of absence.

13 Section 20630 makes clear that merely because Respondents were on administrative
14 leave during their time as captains does not preclude CalPERS from including this income as
15 part of their pension benefits. Respondent Hurt's pay records make clear that he was paid as a
16 captain from May 28, 2010 to January 17, 2011 and Respondent Bacon received captain's pay
17 from May 28, 2010 to July 15, 2010. (Exhibit 8). These records demonstrate that Respondents
18 were being paid as captains while they remained on administrative leave. Finally, as required by
19 section 20630, this "compensation" was paid from City of Riverside funds, thus satisfying all of
20 the compenSation requirements of the section.

21
22 **2. Respondent's salaries need not be considered "special compensation" to be**
23 **included with their retirement benefits because they were compensated at the same**
24 **rates as all other captains and these wages were not paid in connection with**
25 **retirement because Respondents were actually promoted to the rank of captain and**
26 **remained in those positions for several months before retiring from the department**

27 Section 20636(c)(1) defines special compensation as payment received for special skills,
28 knowledge, abilities, work assignment, workdays or hours or other work conditions. Pursuant to

1 section 20636(c)(7)(A), special compensation does not include final settlement pay.
2 Furthermore, section 20636(f) further defines "final settlement pay" to mean pay or cash
3 conversions of employee benefits that are in excess of compensation earnable, that are granted or
4 awarded to a member in connection with, or in anticipation of, a separation from employment.

5 California Code of Regulations, Title 2, Section 570 defines "final settlement pay" to
6 mean any pay or cash conversions of employee benefits in excess of compensation earnable, that
7 are granted or awarded to a member in connection with or in anticipation of a separation from
8 employment. Final settlement pay is excluded from payroll reporting to PERS, in either payrate
9 or compensation earnable.

10 Here, Respondents are not required to prove that the compensation they received as
11 captains should be considered "special compensation." The facts of their case make it clear that
12 regardless of what terms are used, e.g. "special salary adjustment pursuant to settlement,"
13 Respondents were promoted to the rank of captain. They remained in that position from the date
14 of settlement until their respective retirement dates and were compensated as all other similarly
15 situated top-step captains. (Exhibit 7).

16 While Respondents were given their Captains' pay and benefits as part of the settlement
17 agreement, this is only due to the fact that both had been repeatedly denied promotions due to
18 their involvement in protected activities. (RT Hearing 18:14-17; RT Hearing 71:14-19).
19 Moreover, even though the increases were included in the settlement agreement, the
20 Respondent's salaries were not in excess of compensation earnable. Instead, they were
21 completely in-line with all other top-step captains and paid in accordance with the publicly
22 available pay schedule.

23 Respondent's increase in payrate should not be considered "final settlement pay" because
24 they did not receive the increase "in connection" with or "anticipation of" their retirements. As
25 discussed above, Respondents were veteran lieutenants and were well qualified for the position
26 of captain. (RT Hearing 15:13-15; RT Hearing 69:8-10). Both were denied the benefits of
27 Captain until they sued the City; one of the remedies sought was a promotion to captain. (RT
28 Hearing 56:12-15). While Respondents were placed on administrative leave pending their

1 respective retirement dates, it is clear that it would have been difficult for either to perform
2 management duties after having accused the City and its upper-management employees of
3 engaging in unlawful practices. Moreover, Respondents retained their police powers, badges and
4 duty firearms while on administrative leave. (RT Hearing 59:4-8). These facts make it clear
5 Respondent's remained police officers once the settlement agreement was reached.

6 The wording of the settlement agreement is clear, Respondents were to remain as police
7 captains until they were each eligible for retirement. (Exhibit 7). For Respondent Bacon, this was
8 approximately three months and for Respondent Bacon this was approximately seven months.
9 (Exhibit 7). Merely because the terms of their retirements are mentioned in the settlement
10 agreement does not make their promotions and increased salaries "in connection" with their
11 retirement. The settlement agreement simply sought to make all parties rights and obligations
12 clear to those involved.

13 In Molina, the pensioner was reinstated for one day for the sole purpose of allowing him
14 to purchase service credits from CalPERS. Molina, 200 Cal.App.4th at 57. There is a clear
15 difference between Respondent's case and the appellant in Molina. Respondents were in their
16 positions as captains for months, received top-step captains pay for months and only retired once
17 they became eligible. (Exhibit 7). This is not a case where a settlement agreement was reached,
18 Respondents were promoted and then retired the next day. "Any ambiguity or uncertainty in the
19 meaning of pension legislation must be resolved in favor of the pensioner, but such construction
20 must be consistent with the clear language and purpose of the statute. [Citations] Ventura
21 County Deputy Sheriffs' Assn. v. Board of Retirement, 16 Cal. 4th 483, 490, 940 (Cal. 1997).
22 Interpreting "...in connection with" or "anticipation of" so broadly as to encompass the instant
23 circumstances defies the Supreme Court's mandate as stated in Ventura, and would make nearly
24 any pay increase late in a pensioner's career non pensionable.

1 **B. EQUITABLE ESTOPPEL SHOULD BE IMPOSED AGAINST CALPERS**
2 **BECAUSE THE RESPONDENTS DETRIMENTALLY RELIED ON CALPERS**
3 **REPRESENTATIONS**

4 It is well established that “the government may be bound by an equitable estoppel” to
5 avoid an injustice. City of Long Beach v. Mansell (1970) 3 Cal.3d 462, 496-97. Courts in several
6 jurisdictions, including California, have upheld the application of equitable estoppel against
7 government retirement organizations. See, e.g. Crumpler v. Board of Administration, (1973) 32.
8 Cal.App.3d 567; Sellers v. Board of Trustees of Police and Fireman’s Retirement System, (2008)
9 399 N.J.Super. 51; Kentucky Retirement Systems v. Fryrear, (2009) 316 S.W.3d 307.

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11 **1. CalPERS was aware of the facts of the Respondent’s situation, knew that the**
12 **Respondents would rely on the information provided by CalPERS and Hurt and**
13 **Bacon reasonably relied upon information that was provided to them and have lost**
14 **retirement rights as a result.**

15 The Respondents detrimental reliance on CalPERS’ assurances as to their right to receive
16 top-step captain’s retirement benefits requires the imposition of estoppel. The burden of
17 establishing that all of the estoppel requirements have been met falls upon the party asserting the
18 estoppel. CalPERS Precedential Board Decision No. 98-02, p. 10.

19 In City of Long Beach v. Mansell, the California Supreme Court held that four elements
20 must be present in order to apply the doctrine of equitable estoppel. The elements are: (1) the
21 party to be estopped must be apprised of the facts; (2) the party to be estopped must intend by
22 his/her conduct to induce reliance, or must so act that the party asserting the estoppel had a right
23 to believe reliance was so intended; (3) the party asserting estoppel must be ignorant of the true
24 state of facts; and (4) the party asserting estoppel must rely upon the conduct to his injury. City
25 of Long Beach, 3 Cal.3d at 496-97.

26 First, CalPERS was aware of the true facts involving the Respondents and the terms of
27 their retirement. As Senator Roth testified, he was present at a conference call that took place in
28 or around April of 2010 at which City staff spoke with a representative of CalPERS. (RT

1 Hearing 87:18-88:12). The purpose of this call was to outline the proposed settlement agreement
2 to CalPERS and ensure that there would be no issues with its terms. (RT Hearing 88:21-23). The
3 representative of CalPERS indicated that the terms would be acceptable and that both Hurt and
4 Bacon would receive retirement benefits at a top-stop captain payrate. (RT Hearing 90:1-9).

5 A CalPERS Retirement Program Specialist, Samuel Camacho, testified that CalPERS
6 regularly consults with public agencies on how to classify compensation earnable and how to
7 deal with other issues related to retirement accounts. (RT Hearing 129:1-3). Camacho also
8 testified that, in his experience, if the agency were to accept the opinion of CalPERS of being
9 correct, then a city would likely include that opinion in its decision making process. (RT Hearing
10 149:13-16).

11 Camacho testified that an agency will usually provide a scenario or pose a specific
12 question and that the CalPERS employee will then offer the agency a response on how to
13 correctly report the compensation. (RT Hearing 150:1-4). Thus, as testified to by a CalPERS
14 employee, it is common for CalPERS to become aware of a specific factual situation being faced
15 by a member.

16 While CalPERS failed to document the call, this is a common situation where a factual
17 scenario was given to CalPERS and CalPERS rendered an opinion based on specific facts.
18 Senator Roth testified more than credibly, and CalPERS put on no evidence to refute the veracity
19 of his testimony. Because CalPERS was made aware of the facts as they pertain to Respondents,
20 Respondents have met their burden of showing that CalPERS was appraised of the facts.

21 Next, CalPERS knew that Respondents would likely act based on the representations
22 made about their receiving captain retirement benefits. Senator Roth made it clear that the call
23 was intended to offer assurances that the terms of the settlement agreement between the City and
24 Respondents would factor into the Respondent's retirement calculations. (RT Hearing 88:21-23).
25 Camacho also acknowledged that while a member or agency makes the ultimate decision, part of
26 that decision-making process includes the information that was given to them by CalPERS. (RT
27 Hearing 153:11-15).

28

1 Camacho's testimony makes it clear that CalPERS is well aware that members and
2 agencies seek its advice and opinion on a regular basis and will generally act in accordance with
3 that opinion, thus showing that CalPERS intended to induce reliance by telling the City that
4 Respondents would receive retirement benefits as captains.

5 Further, Respondents were unaware that their agreement with the City was insufficient
6 for them to receive the retirement benefits that they were promised. Respondent Darryl Hurt
7 testified that the settlement agreement, as he understood it, required that he be compensated at
8 the rate of captain for the period of time between the agreement and his retirement date. (RT
9 Hearing 24:3). Respondent Hurt also believed that the captain's pay would be calculated into his
10 pension benefits and that he was retiring from the police department as a captain. (RT Hearing
11 24:10-22). Hurt actually took affirmative steps to ensure that he would receive the retirement to
12 which he was entitled. Specifically, during the negotiations process, Hurt inquired as to how the
13 settlement agreement would affect his pension. (RT Hearing 24:23-25:1). Hurt was told that the
14 City and Senator Roth were asking CalPERS those questions. (RT Hearing 25:14-15). Hurt
15 ultimately testified that if he had known the facts as they were, meaning that his promotion
16 would not be included in his retirement, he would not have accepted the settlement agreement.
17 (RT Hearing 26:9-17).

18 Respondent Timothy Bacon testified that the settlement agreement required that he
19 receive back pay as a top-step captain, be compensated as a top-step captain for the period
20 between the agreement and his retirement and that he receive retirement benefits as a top-step
21 captain. (RT Hearing 77:11-78:4). Specifically, Bacon was told by the assistant city attorney and
22 Senator Roth that the City had agreed to the terms and that he would retire as a top-step captain.
23 (RT Hearing 80:12-20).

24 Bacon testified that that he believed the City had consulted with CalPERS and that all
25 were in agreement as to him receiving captain's pension benefits. (RT Hearing 81:1-6). As with
26 Respondent Hurt, Bacon stated that he would never have accepted the terms of the settlement
27 agreement if he were aware that CalPERS was not going to include his captain benefits. (RT
28 Hearing 81:1-6).

1 In Molina, both the pensioner and city were aware that “any characterization of the
2 settlement proceeds would not be relevant to any determination as to the proper amount of
3 Molina’s CalPERS pension. Molina, 200 Cal.App.4th at 64. In fact, CalPERS had advised both
4 Molina and Oxnard that if Molina were reinstated for a full year into a position that existed under
5 a legitimate salary schedule, then a portion of the settlement could potentially be included in
6 Molina’s pension benefits. *Id.*

7 Unlike Molina, Respondents never actually separated from the police department until
8 they retired. Instead, both remained on active duty as the lawsuit between Respondents and the
9 City was litigated and, once the settlement agreement was reached, both were placed on
10 administrative leave. (Exhibit 7). Furthermore, during this period of administrative leave,
11 Respondents were compensated as captains and retained all of their police powers. (Exhibit 8;
12 RT Hearing 59:4-8).

13 As demonstrated by the facts in Molina, CalPERS would have apparently required the
14 Respondents to have been in the position for an extended period of time in order to receive the
15 retirement benefits associated with that position. Respondents clearly meet that burden. The
16 settlement agreement between the City and Respondents was reached on April 12, 2010. (Exhibit
17 7). Respondent Hurt retired from service on January 19, 2011, and Respondent Bacon retired on
18 July 17, 2010. *Id.*

19 And lastly, Respondents have suffered harm as a result of CalPERS refusal to include
20 their captain benefits as part of their pension calculations. Hurt testified that he was emotionally
21 upset because he felt that the City backed out of the agreement that was reached. (RT Hearing
22 27:5-12). Additionally, Hurt retired from the police department under the assumption that he was
23 going to receive benefits at a certain level, but suddenly this amount was drastically reduced.
24 (RT Hearing 27:23-24).

25 Similarly, Bacon testified that not receiving the captain’s level retirement benefits has
26 negatively affected him as well. (RT Hearing 82:1-9). The difference between top-step lieutenant
27 retirement benefits and top-stop captain benefits is approximately \$2,000, clearly an economic
28 impact on the average retired public employee. (RT Hearing 27:23-24).

1 In City of Pleasanton v. Board of Administration of the California Public Employees'
2 Retirement System, the court also required that a person asserting equitable estoppel must prove
3 that he "did not have notice of facts sufficient to put a reasonably prudent man upon inquiry, the
4 pursuit of which would have led to actual knowledge." (2012) 211 Cal.App.4th 522, 544.

5 While this requirement might preclude many employees from being able to assert an
6 estoppel claim, it actually strengthens Respondents' arguments as to why estoppel should apply.
7 Respondents were assured by the City's counsel that CalPERS had been told about the settlement
8 agreement and that the promotion to captain would be considered in their pension calculations.
9 (RT Hearing 90:1-9). Thus, any further pursuit of this issue would have only led to an additional
10 opinion by CalPERS that Respondents would retire with captain's benefits.

11 **2. Respondent's met the burden of proof for their estoppel claim and granting**
12 **them pension benefits as captains does not effect any public interest**

13 As argued above, Respondents have met their burden when it comes to demonstrating
14 that CalPERS should be estopped from denying their retirement benefits at captain levels. The
15 second part to the estoppel test as it applies to public entities deals with the effect that the
16 estoppel may have on public interest or policy.

17 Specifically, a government entity "may be bound by an equitable estoppel in the same
18 manner as a private party when the elements requisite to such an estoppel against a private party
19 are present" and any injustice that may result from not granting the estoppel claim is "of
20 sufficient dimension to justify any effect upon public interest or policy which would result from
21 the raising of an estoppel." City of Long Beach, 3 Cal.3d at 496-97.

22 In Medina v. Board of Retirement, the court held that "equitable estoppel is barred where
23 the government agency to be estopped does not possess the authority to do what it appeared to be
24 doing." (2012) 112 Cal.App.4th 864, 870. Specifically, "principles of estoppel may not be
25 invoked to directly contravene statutory limitations." Id. at 869. In Medina, the employees
26 sought to retain their public safety classification after switching positions and moving to the
27 district attorneys office, a non-safety position for retirement purposes. The court held that the
28

1 retirement board did not have the authority to continue to classify the employees as public safety,
2 thus requiring them to be classified according to their current positions. Id. at 870.

3 Here, however, CalPERS does have the authority to grant the Respondents the higher
4 pension classification to which they are entitled. As argued above, Respondent's are entitled to
5 receive retirement benefits based on their "final compensation." An employee's "final
6 compensation" is a "function of the employee's highest 'compensation earnable by a member
7 during the three consecutive years of employment immediately preceding the effective date of
8 retirement..." Prentice v. Board of Admin., California Public Employees' Retirement System
9 (2007) 157 Cal.App.4th 983, 989.

10 Section 20636(a) provides, "[c]ompensation earnable" by a member means the payrate
11 and special compensation of the member, as defined by subdivisions (b), (c), and (g), and as
12 limited by section 21752.5.

13 Under section 20636, subdivision (b)(1), "payrate" means the normal monthly rate of pay
14 or base pay of the member paid in cash to similarly situated members of the same group or class
15 of employment for services rendered on a full-time basis during normal working hours, pursuant
16 to publicly available pay schedules. "Payrate," for a member who is not in a group or class,
17 means the monthly rate of pay or base pay of the member, paid in cash and pursuant to publicly
18 available pay schedules, for services rendered on a full-time basis during normal working hours,
19 subject to the limitations of paragraph (2) of subdivision (e).

20 Here, the discussions between the City and CalPERS and the Respondent's testimony
21 make it clear that all believed Respondents were retiring effectively captains. (RT Hearing
22 88:21-23; RT Hearing 24:10-22). Moreover, the City paid Respondents back pay at a top-step
23 captain level and paid each a salary commensurate with a top-step captain between the date of
24 the agreement and their retirement. (RT Hearing 77:11-78:4). All wages received by
25 Respondents during this time were paid pursuant to the publicly available pay schedules for the
26 position of police captain and in accordance with wages received by similarly situated captains.

27 Respondents are thus entitled to have their "final compensation" be considered at a top-
28 step captain level. Because the top-step captain retirement benefits fall within the statutory

1 requirements and thus can be granted by CalPERS, the court's holding in Medina does not
2 preclude the benefits from being granted to Hurt and Bacon.

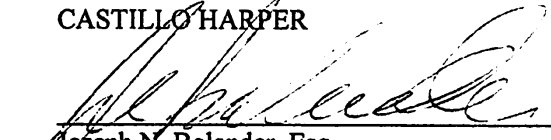
3
4 **V. CONCLUSION**

5 Based on the foregoing, the Respondents respectfully request that the decision of
6 CalPERS to not include the Respondent's captain's compensation as part of their retirement
7 benefits be reversed and that Respondent's receive the pension benefits to which they are
8 entitled.

9
10 Dated: September 14, 2015

Respectfully submitted,

11
12 **CASTILLO HARPER**

13 
14 _____
15 Joseph N. Bolander, Esq.
16 *Attorneys for*
17 **TIMOTHY BACON and DARRYL HURT**

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PROOF OF SERVICE

I declare that I am over the age of eighteen (18) and not a party to this action. My business address is 3333 Concourse St., Bldg. 4, Ste. 4100, Ontario, CA 91764.

On September 14, 2015, I served the following document described as **RESPONDENT'S CLOSING ARGUMENT** on the interested parties in this action by placing a true and correct copy of each document thereof, enclosed in a sealed envelope addressed as follows:

Office of Administrative Hearings <i>Attn: Administrative Law Judge,</i> <i>Mary Agnes Matyszewski</i> Sanfilings@dgs.ca.gov Via EMAIL ONLY	CalPERS <i>Attn: Preet Kaur, Staff Attorney</i> P.O. Box 94707 Sacramento, CA 9422-2707 preet.kaur@calpers.ca.gov VIA US MAIL AND EMAIL
City of Riverside <i>Attn: Neil Okazaki</i> 3900 Main Street Riverside, CA 92522 nokazaki@riversideca.gov VIA US MAIL AND EMAIL	

I am readily familiar with the business practice for collection and processing of correspondence for mailing with the United States Postal Service. I know that the correspondence was deposited with the United States Postal Service on the same day this declaration was executed in the ordinary course of business. I know that the envelope was sealed and, with postage thereon fully prepaid, placed for collection and mailing on this date in the United States mail at Ontario, California.

By Personal Service, I caused such envelope to be delivered by hand to the above addressee(s).

By facsimile machine, I caused the above-referenced document(s) to be transmitted to the above-named persons(s)

By Overnight Courier, I caused the above referenced document(s) to be delivered to an overnight courier (UPS) for delivery to the above addressee(s).

BY ELECTRONIC MAIL (E-MAIL) I served the foregoing document by electronic mail (e-mail): nokazaki@riversideca.gov; preet.kaur@calpers.ca.gov; Sanfilings@dgs.ca.gov

(State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on September 14, 2015, at Ontario, California.

Nancy Adams

PROOF OF SERVICE



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4 Attorneys for California Public
5 Employees' Retirement System

6 BOARD OF ADMINISTRATION
7 CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

8	In the Matter of the Application for Final Compensation	)	CASE NO. 2012-0191
9	TIMOTHY BACON & DARRYL HURT,	)	OAH NO. 2014090781
10	Respondents,	)	CalPERS' CLOSING BRIEF
11	and	)	Hearing Date: May 28, 2015 at 10:00 am
12	CITY OF RIVERSIDE,	)	Hearing Location: San Bernardino
13	Respondent.	)	Prehearing Conf.: None Scheduled Settlement Conf.: None Scheduled

14 The California Public Employees' Retirement System (CalPERS) submits the
15 following as its Closing Brief in the above-captioned matter:
16

17 I.

18 STATEMENT OF CASE

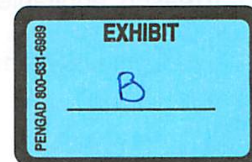
19 The sole issue at appeal is whether the payrate increase, provided pursuant to
20 a settlement agreement in anticipation of separation, can be included in the calculation
21 of Bacon and Hurt's final compensation. (Exhs. 1 & 2)

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II.

INTRODUCTION

In 2010, Respondents Darryl Hurt (Hurt) and Timothy Bacon (Bacon) filed a lawsuit against the City of Riverside (City) for failure to promote and other civil code violations. Respondents settled the matter, whereby Hurt and Bacon agreed to be placed on administrative leave and retire. In return, the City agreed to pay additional money to ensure Hurt and Bacon receive "at least 12 months of compensation at the top-step captain rate prior to their retirement."

All the information provided by the City demonstrates that Hurt and Bacon were classified as Lieutenants. Hurt and Bacon retired on Industrial Disability Retirement (IDR), claiming they were substantially incapacitated from performing their job duties as Lieutenants. As a result, Hurt and Bacon receive a monthly check greater than the standard disability allowance and most of it tax-free.

Despite the advantages of the IDR allowance, Hurt and Bacon now request their final compensation to be based on the top-step payrate of a Captain. Hurt and Bacon invite OAH to rewrite California's Public Employees' Retirement Law (the PERL, our state pension law) to receive a higher retirement allowance.

CalPERS cannot base Hurt and Bacon's final compensation on the top-step payrate of a Captain, while basing the final compensation of other similarly situated Lieutenants on the payrate of a Lieutenant. Doing so, it would be a violation of the PERL, even if the increase in payrate is characterized as "back pay." For this same reason, equitable relief cannot be granted. Thus, OAH should uphold CalPERS' determination and deny Hurt and Bacon's appeal.

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III.

FACTUAL BACKGROUND

Separation from Employment in Exchange of Settlement Payments:

Hurt and Bacon were employed by the City as Police Lieutenants. On April 12, 2010, Respondents entered into a settlement agreement (Settlement), in a lawsuit filed by Bacon and Hurt, against the City, alleging labor and civil code violations, failure to promote, and retaliation. (Respondents' Exhs. 5, 6 & 7.)

The Settlement stated that:

- "Hurt will retire from the City of Riverside Police Department as a Police Lieutenant on January 19, 2011 and Bacon will retire as a Police Lieutenant on July 17, 2010, both 50 years of age." (Respondent's Exh. 7, p.2:7-10.)
- The City would "pay to Hurt and Bacon additional compensation from January 25, 2008, to today's date per the Captain pay scale and during the administrative leave period . . ." "[T]he City will ensure that both received at least 12 months of compensation at the top-step Captain rate prior to their retirement." (Respondents' Exh. 7, p. 2:15-21.) This was later reported to CalPERS as a "special salary adjustment." (Exhs. 16 & 17.)
- The City will place "[L]ieutenants Hurt and Bacon on paid administrative leave at a monthly salary equivalent to the top-step Captain's monthly salary rate with full benefits commencing tomorrow and continuing to the respective dates of their retirement." (Respondent's Exh. 7, p. 3:7-11.)
- Hurt will be paid \$300,000 and Bacon will be paid \$250,000 as "noneconomic damages."

The Settlement included confidentiality restrictions, whereby Bacon and Hurt

1 were to "maintain the confidentiality of and . . . not discuss . . . the terms and conditions
2 of this settlement, subject to certain limited disclosures to prospective employers".
3 (Exh. 19, pp. 3-7; Transcript 23:18-20)

4 Pursuant to the Settlement, Hurt was placed on administrative leave for
5 approximately nine months, from April 14, 2010 to January 19, 2011, the date of his
6 IDR retirement. (Exhs. 20, p. 2; 9, p. 1.) Bacon was placed on administrative leave for
7 approximately three months, from April 14, 2010, to July 17, 2010, the date of his IDR
8 retirement. (Exh. 20, pp. 2 & 4.)

9 Substantially Incapacitated From Performing Job Duties of Police Lieutenant:

10 On September 1, 2010, Hurt signed an application for IDR. (Exh. 9.) Hurt wrote
11 "Police Lieutenant" as his position title. (Exh. 9, p. 1.)

12 On October 14, 2011, the City Manager, Scott Barber, sent a letter to CalPERS
13 stating that Hurt is substantially incapacitated from performing "his duties in the
14 position of Police Lieutenant. . ." due to his work restrictions. (Exh. 10, pp. 9 & 10.) Mr.
15 Barber further certified that Hurt was "separated from his employment in the position
16 [of a] Police Lieutenant after expiration of his leave rights . . ." (Exh. 10, pp. 9 & 10.)

17 On June 28, 2010, Bacon signed an application for service pending IDR. (Exh.
18 10.) On Section 2, page 1, of his application, Bacon wrote "Police Lieutenant" as his
19 position title. (Exh.. 10, p. 1.) In the application, Bacon stated he "[c]annot Stand For
20 Long Periods of Time, Very Limited Mobility, Ongoing Pain. Cannot Walk w/out limp.
21 Hard Time Lifting." Bacon also stated his limitations and that it is impossible for him to
22 perform his job due to his injury or illness. (Exh.. 10, p.2.)

23 Promotional Process:

24 At the hearing on May 28, 2015, Hurt testified regarding the City's merit based
25 process to promote a Lieutenant to the rank of Captain. (Transcript 45:16-25; 46:1-8.)

1 Hurt stated that he was familiar with the process because he was the Union President
2 and the Union "changed the way the Captains were promoted. . ." (Transcript 17:17-
3 18; 18:6.) Hurt explained that to promote a Police Lieutenant to the rank of Captain, 1)
4 the candidate must pass the "Chief Board's oral," a questioning process; 2) the
5 candidate must pass the Chief's One-on-One oral; 3) the Chief makes a list of
6 candidates to recommend for promotion; 4) the Chief then takes the recommendations
7 to the City Manager for approval for promotion. (Transcript 47:20-25; 48; 50:14-15;
8 51:13-25, also see Attachment C, Article 12, Promotional Process, Section 12.1.) Hurt
9 testified that this process was in place when he applied for promotion, in 2006 or 2007.
10 (Transcript 50:9-25; 48:24-25) He also testified that this process was applicable in April
11 2010. (Transcript 50:24-25) Hurt admitted that he was never promoted by the City to
12 the rank of Captain through this process. (Transcript 52:1-2.)

13 Bacon also testified that this process was in place when he filed for promotion in
14 2006 and he was never promoted by the City to the rank of Captain through this merit
15 based process. (Transcript 114:22-25; 115:1-14.)

16 Reporting of payrate:

17 The City reported Hurt's compensation as follows, for the periods of:

- 18 • January 2010 to May 2010, \$12,603.55 was reported, of which, \$11,562.89
19 was in payrate and \$1,040.66 in 9% Employer Paid Member Contributions
20 (EMPC). (Exh. 3, p. 1; Exh. 13, pp. 1 & 2.)
- 21 • June 2010 to January 2011, \$14,588.49, of which, \$13,383.93 was in
22 payrate and \$1,204.56 in 9% EMPC. (Exh. 3, p. 1; Exh. 13, p. 1.)

23 The City reported Bacon's compensation as follows, for the periods of:

- 24 • July 2009 to May 2010, \$12,603.55 was reported, of which, \$11,562.89 was
25

- 1 in payrate and \$1,040.66 in 9% EMPC. (Exh. 3, p. 1; Exh. 14, pp. 1 & 2.)
- 2 • June 2010 to July 2010, \$14,588.49, of which, \$13,383.93 was in payrate
- 3 and \$1,204.56 in 9% EMPC. (Exh. 3, p. 1; Exh. 14, p. 1.)

4 Correspondence Between City and CalPERS:

5 CalPERS' Compensation Review Unit requested supporting documents from

6 the City to determine the reason for the change in payrate. (Exh. 3, p. 1 & Exh. 4, p. 1.)

7 On March 17, 2011, CalPERS requested the City clarify Bacon's job title

8 because he was listed as a Lieutenant but his last posted salary exceeded the

9 maximum payrate for the Lieutenant position. (Exh. 18, p. 4.)

10 On March 23, 2011, Jana Maurice, the Payroll Supervisor for the City confirmed

11 that Bacon is a Lieutenant. (Exh. 18, p. 3). Ms. Maurice also attached his salary

12 schedule, referencing the bottom of page 61 and top of page 62, which lists the job

13 description of a Police Lieutenant and the pay as \$11,563.00. (Exh. 18, pp. 1-3.) Ms.

14 Maurice expressed Hurt may be in a similar position. (Exh. 18, p. 4.)

15 On March 24, 2011, CalPERS notified Jeremy Hammond, the Deputy HR

16 Director for the City, that Bacon's salary for Police Lieutenant exceeds the maximum

17 Step 7 salary on the salary schedule and requested supporting documents leading to

18 the increase. On March 25, 2011, Mr. Hammond clarified that the increase in payrate

19 "was a result of a settlement agreement..." and attached the Personnel Action Form

20 (PAF). (Exh. 17, p. 1.) The PAF lists Bacon as a Police Lieutenant, under Item 27,

21 Pay Class, and Item 29, Position Number (Exh. 17, p. 2.) Remarks section states,

22 "SPECIAL SALARY ADJUSTMENT PURSUANT TO SETTLEMENT/Effective 4/13/10 .

23 .." (Exh. 17, p. 2.)

24 On March 11, 2011, CalPERS requested Mr. Hammond provide clarification

25 regarding Hurt's salary increase to top-step pay for Captain considering Hurt's

1 application for retirement stated he is a Police Lieutenant. (Exh. 16, p. 2). Mr.
2 Hammond explained "[t]he settlement agreement required Mr. Hurt to be compensated
3 at the top step of a Captain Range, but he was not formally promoted to the rank of
4 Captain." (Exh. 16, p. 1.) Mr. Hammond attached a copy of the Settlement and
5 clarified that the Settlement was "placed on the record in court so all we have is the
6 transcript of the settlement proceeding." (Exh. 16, p. 1.) The Settlement repeatedly
7 refers to Hurt and Bacon as Lieutenants. (Exh. 15, pp. 2:7-10; 3:1,7,21; 4:1; 5:14.) Mr.
8 Hammond also attached a PAF for Hurt. (Exh. 16, p. 1.) The PAF lists Hurt as a Police
9 Lieutenant, under Item 27, Pay Class, and Item 29, Position Number (Exh. 16, p. 3.)
10 Remarks section states, "SPECIAL SALARY ADJUSTMENT PURSUANT TO
11 SETTLEMENT/Effective 4/13/10 . . ." (Exh. 16, p. 3.)

12 Respondents Hurt and Bacon's Basis for Estoppel:

13 Senator Richard Roth, outside counsel for the City at the time of the Settlement,
14 testified that he was present during a phone call between the City's Human Resources'
15 staff and someone he understood to be a CalPERS' representative. (Transcript pp.
16 87:14-25; 88:1-12.) Senator Roth testified that the communication between the City
17 and the CalPERS' representative lead Senator Roth to believe that CalPERS had "no
18 objections to what [the City was] proposing in the federal district court settlement"
19 (Transcript 88:17-23.) He, however, could not recall any details, such as the name of
20 the City's Human Resources' staff, the date and time of the call, the name of the
21 CalPERS' representative, the title of the representative, who spoke during the
22 discussion, or what the representative stated. (Transcript 87:18-25; 88:1-23; 89:16-
23 17.)

24 There is no evidence that CalPERS provided anything in writing, to any party,
25 stating Hurt and Bacon will receive retirement benefits based on the Captain's pay

1 scale. (Exhs. 11 &12, Transcript 94:17-21; 95:15-25; 96:1-13.) Furthermore,
2 CalPERS has no record indicating such a discussion even took place. (*Id.*)

3 CalPERS Determination:

4 Based on the information provided by Respondents, CalPERS determined the
5 "special salary adjustment" cannot be included in the calculation of final compensation
6 because the increase in payrate does not qualify as compensation and cannot be
7 considered compensation earnable. (Exhs. 3 & 4.)

8 IV.

9 **RESPONDENTS HAVE THE BURDEN OF PROOF**

10 As the sole agency charged with the enforcement of the PERL, and specifically
11 membership and benefits, CalPERS determinations are entitled to great deference.
12 (*City of Pleasanton v. Board of Administration of the California Public Employees'*
13 *Retirement System* (2012) 211 Cal. App. 4th at p. 522, 539 ['where our review requires
14 that we interpret the PERL or a PERS regulation, the court accords great weight to
15 PERS interpretation.']; See also *Molina v. Board of Administration* (2011) 200
16 Cal.App.4th 53, 61; [construing § 20636]; *Prentice v. Board of Administration*,
17 (2007)157 Cal. App. 4th 983, 989 [construing § 20636]; *City of Sacramento v. Public*
18 *Employees Retirement System* (1991) 229 Cal. App. 3d 1470, 1478.) CalPERS has
19 the expertise and technical knowledge as well as an intimate knowledge of the
20 problems dealt with in the statute and the various administrative consequences arising
21 from particular interpretations. (*City of Pleasanton*, 211 Cal. App. 4th at p. 539, citing
22 *Yamaha Corp. of America v. State Bd. of Equalization* (1999) 73 Cal. App. 4th at p.
23 338, 353.) In addition to the great deference, CalPERS' determinations are entitled to
24 a *presumption* of correctness. (Evid. Code § 664; *McCoy v. Board of Retirement*
25 (1986) 183 Cal. App. 3d at p. 1044, 1047; *Harmon v. Board of Retirement* (1976) 62

1 Cal. App. 3d at p. 689, 691; *Rau v. Sacramento County Retirement Board* (1966) 247
2 Cal. App. 2d at p. 234, 238; *Bowman v. Board of Commissioners* (1984) 155 Cal. App.
3 3d at p. 937, 947.)

4 Ambiguity or uncertainty in the meaning of pension legislation may not be
5 resolved in favor of a member if it would be inconsistent with the clear language and
6 purpose of the statute. Thus, "courts must not blindly follow such rule of construction
7 where it would eradicate the clear language and purpose of the statute and allow
8 eligibility for those for whom it was obviously not intended." (*Barrett v. Stanislaus*
9 *County Employees Retirement Assn.* (1987) 189 Cal. App. 3d at p. 1593, 1608–1609;
10 *Hudson v. Board of Admin. of Public Employees' Retirement System* (1997) 59 Cal.
11 App. 4th at p. 1310, 1324-25.)

12 In this matter, Hurt and Bacon appealed CalPERS determination of their
13 retirement allowance. (Title 2, Cal. Code Regs. 555.1, 55.2; 555.4.) It is Hurt and
14 Bacon's burden to establish the "Special Salary Adjustment" should to be included in
15 the calculation of final compensation.

16 **V.**

17 **DISCUSSION**

18 **A. Statutory Background**

19 To ensure statewide uniformity in the application of the PERL, the CalPERS'
20 Board of Administration is vested with the sole authority to determine "... who are
21 employees and the sole judge of the conditions under which persons may be admitted
22 to and continue to receive benefits under this System" following a hearing if necessary.
23 (Gov. Code §§ 20120, 20123, 20125, 20134¹; *Metropolitan Water District of California*
24

25 ¹ Unless otherwise stated all statutory references are to the Government Code.

1 *v. Cargill* (2004) 32 Cal. App. 4th 491, 503-505; *City of Los Altos v. Board of*
2 *Administration* (1978) 80 Cal. App. 3d 1049, 1051.)

3 All employees of the state and public agencies are members of the System. A
4 member's retirement allowance is based on factors, including final compensation,
5 service credit and age. (*In re Marriage of Sonne* (2010) 48 Cal. App. 4th 118, 121.)
6 "Compensation" is defined under the PERL as "remuneration paid out of funds
7 controlled by an employer in payment *for the member's services performed* during
8 normal working hours or for time during which the member is excused from work."
9 (§20630.) "Final compensation" is an employee's highest 12 or 36 continuous months
10 of "compensation earnable." (§§ 20037, 20042.)

11 "Compensation earnable" consists of "payrate" and "special compensation."
12 (§20636, subd.(a); Title. 2, Cal. Code Regs., § 570.)² "Payrate" is defined as the
13 "normal" monthly rate of pay or base pay of the member paid in cash to *similarly*
14 *situated members of the same group or class* of employment for services rendered on
15 a full-time basis during normal working hours, *pursuant to* publicly available pay
16 schedules." (§20636, subd. (b); Cal. Code Regs. § 570.5) "Special Compensation," is
17 also statutorily defined; however, a discussion of special compensation is unwarranted
18 as Respondents are not claiming the "special salary adjustment" as special
19 compensation..

20 "Compensation earnable" in not simply the amount of remuneration received by
21 a member. It is "exactly defined to include or exclude various employment benefits
22 and items of pay." (*Oden v. Board of Administration* (1994) 23 Cal. App. 4th 194, 198;
23 citing former §20020 (currently §20630.) The principal purpose for these rules is to
24 prevent "*local agencies from artificially increasing a preferred employee's retirement*

25 ² All regulatory references are to Title 2.

1 *benefits by providing the employee with compensation increases which are not*
2 *available to other similarly situated employees.” (Prentice, 157 Cal. App. 4th at p. 993,*
3 *italics added.)*

4 The PERL and relevant case law mentioned above prohibit the very thing that
5 the Respondents are attempting to achieve here. The City attempted to artificially
6 increase Hurt and Bacon's retirement benefits by providing them with compensation
7 increases which are not available to other Police Lieutenants, even if those Police
8 Lieutenants were on the promotional list. (Transcript 51:13-25.)

9 **B. Settlement Payments Provided to Hurt and Bacon Do Not Qualify as**
10 **Compensation**

11 “Compensation earnable” is a narrow subset of ‘compensation.’ (*Molina*, 200
12 Cal. App. 4th at p. 68.) An item must first meet the broad definition of “compensation”
13 if it is also to fall within the narrower category of “compensation earnable.” (*Id.* at 68-
14 69.) As previously mentioned, compensation is remuneration for the services
15 performed by the member during normal working hours. (§20630.)

16 Applicable case law, discussed below, dictates that performance of duties of a
17 Captain will not entitle Hurt and Bacon to the payrate of a Captain. However, for the
18 sake of discussion, there is no evidence that Hurt and Bacon even performed the
19 duties of a Captain. Hurt and Bacon were not promoted to the position of Captains
20 and not required to have performed or to perform any duties of a Captain in order to
21 receive the settlement payments. Hurt and Bacon received the payments not as
22 remuneration for services performed but as consideration for the resolution of a
23 lawsuit.

24 The Settlement did not mention and did not require Bacon and Hurt to perform
25 any duties in order to receive the payments. (Respondent's Exh. 7). Rather than

1 requiring them to perform the duties of a Captain, the Settlement required Hurt and
2 Bacon immediately take administrative leave and retire in return for receiving the
3 settlement payments. Although they filed IDR applications, claiming they were unable
4 to perform their usual job duties, Hurt and Bacon testified at the hearing that they did
5 perform job duties while on administrative leave. (Exh. 10, Transcript 52:14-25; 53:1-
6 15; 57: 10-15; 63:6-20; 115:15-25; 116:1-15.) Duties they performed while on
7 administrative leave mostly consisted of them wrapping up the work they left behind as
8 Lieutenants. (*Id.*) There is no evidence demonstrating they performed any duties other
9 than those already required of them as Police Lieutenants. There is also no evidence
10 indicating they performed any duties that are exclusively performed by a Captain.

11 Considering the settlement payments do not qualify as compensation, they
12 cannot qualify as compensation earnable because by definition, compensation
13 earnable is comprised of "compensation." (§§ 20630; 20636, subd. (a).)

14 **C. Settlement Payments Provided to Hurt and Bacon Do Not Qualify as**
15 **Compensation Earnable**

16 Although the settlement payments do not qualify as "compensation," a further
17 review of relevant statutes and case law demonstrates the settlement payments also
18 fail to qualify as "compensation earnable." The payments fail to meet the definition of
19 payrate under the PERL. As previously mentioned, payrate is the normal monthly
20 amount of cash compensation of a member 1) to similarly situated members of the
21 same group or class; 2) for services rendered; and 3) pursuant to publicly available pay
22 schedules. (§ 20636, subd. (b)(1).)

23 ///

24 ///

25

1 (1) The Settlement Payments Were Not Available To Members of Hurt
2 and Bacon's Group of Employment

3 In determining Hurt and Bacon's payrate under the PERL, CalPERS must look
4 to the normal rate of pay or base pay of the similarly situated members of the same
5 group or class of employment rendering services on a full time basis during normal
6 working hours. (§20636, subd. (b); *Prentice*, 157 Cal. App. th at p. 990.) Thus, it must
7 first be determined which employee class or group Hurt and Bacon belonged to or their
8 member classification. (§ 20636, subd. (b)(1),(2),(e)(2).)

9 In an attempt to determine which group or class *Prentice* belonged to, the court
10 looked at the information the city initially provided to CalPERS in response to
11 CalPERS' inquiry concerning *Prentice's* group or class. (*Prentice*, 157 Cal. App. 4th at
12 p. 983, 992-993.) The court looked at the initial correspondence between the city and
13 CalPERS rather than relying on *Prentice's* the self-serving statements. *Id.* Similarly, if
14 we look at the information initially provided by the City, to CalPERS in response to
15 CalPERS' inquiries concerning Hurt and Bacon's classification, the evidence
16 overwhelmingly demonstrates that Hurt and Bacon belonged to Police Lieutenant
17 group or class.

18 The IDR applications filed by Hurt and Bacon, state they are Police Lieutenants.
19 (Exhs. 9 & 10.) The applications were filed based on their inability to perform the duties
20 of a Police Lieutenant. (Exhs. 9 & 10.) Scott Barber's letter to CalPERS specifically
21 states Hurt is being separated from his employment of a Police Lieutenant. (Exh. 10,
22 pp. 9 & 10.) Ms. Maurice and Mr. Hammond, from the City, notified CalPERS that
23 Bacon was a Police Lieutenant and provided the salary schedule of a Police
24 Lieutenant in reference to Bacon's payrate. (Exh. 18.) Ms. Maurice expressed Hurt
25

1 may be in a similar position. (Exh. 18, p. 4.). Mr. Hammond provided CalPERS the
2 PAFs, which listed Bacon and Hurt as Police Lieutenants. (Exhs. 16 & 17.)

3 The Settlement repeatedly refers to Hurt and Bacon as Police Lieutenants.
4 (Exh. 15, pp. 2:7-10; 3:1,7,21; 4:1; 5:14.) Furthermore, Hurt and Bacon both testified
5 that they were never promoted by the City to the rank of a Captain through the City's
6 merit based promotional process, although they were on the promotional list.
7 (Transcript 52:1-2; 114:22-25; 115:1-14.)

8 Although Hurt and Bacon were classified as Police Lieutenants, they now claim
9 they were Captains. The *Prentice* court, however, rejected the idea that an employee
10 may be a member of more than one group or classification. (*Prentice*, 157 Cal.App.4th
11 at p. 993.) Thus, in line with *Prentice*, OAH should look at the information initially
12 provided by the City to CalPERS, rather than relying on the self-serving testimony of
13 Hurt and Bacon.

14 (2) Hurt and Bacon Did Not Perform the Duties of a Captain

15 As previously discussed, Hurt and Bacon fail to meet the second prong because
16 there is no evidence indicating they performed duties other than those of a Lieutenant.
17 However, even if it is assumed that Hurt and Bacon performed the duties of a higher
18 classification, this does not entitle them to the payrate of a Captain.

19 *Snow*, an Assistant Land Agent claimed he was performing the duties of higher
20 classification. (*Snow v. Bd. of Admin.* (1978) 87 Cal. App. 3d 484, 486.) *Snow*
21 received an award, by the Board of Control, for the difference in salary between an
22 Assistant Land Agent, and the higher classification of Associate Land Agent. (*Id.*)
23 *Snow* argued the award should be included in calculating his pension benefits. (*Id.*)
24 The court looked at the applicable rules for civil service and held, however, that "mere
25 assumption and performance of the duties of a higher classification cannot require that

1 the employee be appointed to it." (*Id.* at 489.) The court further held that the award
2 was not compensation earnable as "Snow was entitled to the position of Assistant
3 Land Agent and not that of Associate Land Agent." (*Id.*) Likewise, the City's rules for
4 civil service require that all "appointments and promotions in the classified service shall
5 be based on merit. . ." (Attachment B, City of Riverside Municipal Code, Chapter 2.36,
6 section 2.36.050.) The Memorandum of Understanding sets out the merit based
7 promotional procedure for a Captain. (Attachment C.) Hurt and Bacon tested for and
8 were placed on the promotional list, but were never promoted through the merit based
9 promotional procedure. (Transcript 52:1-2, 114:22-25; 115:1-14.)

10 Similarly in *Ligon v. State Personnel Bd.* (1981) 123 Cal. App. 3d 583, 589-590,
11 the court held that "the mere assumption and performance of the duties of a higher
12 classification cannot require that the employee be appointed to it. *Snow's* assumption,
13 with the concurrence of his supervisors, of the duties of an (out-of-class position) did
14 not entitle him to the higher classification...." Thus, even performing the duties of a
15 Captain would not entitle Hurt and Bacon to a higher classification.

16 Furthermore, Hurt and Bacon's argument, that because the Settlement provided
17 additional compensation per the Captain's rate, they should be classified as Captains
18 is erroneous. It is the group or class of employment that drives the payrate, not vice
19 versa. What a specific member is actually paid will be limited and circumscribed to that
20 paid by similarly situated members and the excess is irrelevant for use in the
21 calculation of pension benefits. (§20636, subd. (b); *City of Sacramento v. Public*
22 *Employees Retirement System, supra*, 229 Cal.App.3d at p. 1470.)

23 ///

24 ///

25

1 (3) The Settlement Payments Were Not Paid Pursuant to a Publicly
2 Available Pay Schedule

3 Hurt and Bacon will likely argue the increase in payrate was pursuant to a
4 publicly available pay schedule, because after all, the pay schedule of a Captain for the
5 City of Riverside is readily available to the public. This argument, however, omits the
6 fact that Hurt and Bacon's pay increases were not pursuant to the merit based formal
7 promotional process set out in the MOU, but was rather a result of an individual
8 settlement agreement, terms of which were to be kept confidential.

9 Considering the pay increase was pursuant to an individual settlement
10 agreement is further proof that it cannot be treated as a payrate. (*Molina*, 200
11 Cal.App.4th at pp. 66-67; settlement agreement not a publicly available salary
12 schedule; *In re the Matter of Randy Adams* (OAH 2012030095 (*Adams*)), individual
13 employment agreement.): Cal. Code Regs. 570.5.)

14 After considering the plain language of the statute and the legislative history, the
15 *Adams* court held that as a matter of law, an individual employment agreement, even if
16 available to the public cannot qualify as a [publicly available pay schedule, finding:

17 "SB53 was designed "to curb "spiking," the intentional inflation of a public
18 employee's final compensation, and to prevent unfunded pension fund
19 liabilities. SB53 defined "compensation earnable" in terms of normal
20 payrate, rate of pay, or base pay so payrates would be "stable and
21 predictable among all members of a group or class" and "publically
22 noticed by the governing body." The legislation was intended to restrict
23 an employer's ability to spike pension benefits for preferred employees
24 and to result in equal treatment of public employees. (Senate File History
25 Re: SB 53).

Using a broad interpretation of "pay schedule" based upon the inclusion
of a salary disclosed only in a budget has the vice of permitting an
agency to provide additional compensation to a particular individual
without making the compensation available to other similarly situated
employees. And, a written employment agreement with an individual
employee should not be used to establish that employee's "compensation
earnable" because the employment agreement is not a labor policy or
agreement within the meaning of an existing regulation and would not

1 limit on the compensation a local agency could provide to an individual
2 employee by way of individual agreements for retirement purposes.
3 (*Prentice v. Board of Admin., California Public Employees' Retirement*
4 *System, supra*, 157 Cal.App.4th at pp.994-995.)
5
6 Hurt and Bacon will likely contend that the settlement agreement was part of a
7 public record as it was memorialized in court minutes, thus available to the public.
8 However, for reasons similar to both *Molina* and *Adams*, these arguments must be
9 rejected. The Settlement does not conform with any of the criteria necessary for it to
10 be considered a publicly available pay schedule pursuant to California Code of
11 Regulations 570.5³ or as discussed in *Adams*. The terms of the Settlement were to be
12 kept confidential. Furthermore, the possibility that it may have been produced in
13 response to a public records act request or other legal process after the fact, is
14 insufficient. (*In Re Adams, supra*.)

13 ³ California Code of Regulation's §570.5, provides:
14 (a) For purposes of determining the amount of "compensation earnable" pursuant to Government Code
15 Sections 20630, 20636, and 20636.1, payrate shall be limited to the amount listed on a pay schedule
16 that meets all of the following requirements:
17 (1) Has been duly approved and adopted by the employer's governing body in accordance with
18 requirements of applicable public meetings laws;
19 (2) Identifies the position title for every employee position;
20 (3) Shows the payrate for each identified position, which may be stated as a single amount or as
21 multiple amounts within a range;
22 (4) Indicates the time base, including, but not limited to, whether the time base is hourly, daily, bi-weekly,
23 monthly, bi-monthly, or annually;
24 (5) Is posted at the office of the employer or immediately accessible and available for public review from
25 the employer during normal business hours or posted on the employer's internet website;
26 (6) Indicates an effective date and date of any revisions;
27 (7) Is retained by the employer and available for public inspection for not less than five years; and
28 (8) Does not reference another document in lieu of disclosing the payrate.
29 (b) Whenever an employer fails to meet the requirements of subdivision (a) above, the Board, in its sole
30 discretion, may determine an amount that will be considered to be payrate, taking into consideration all
31 information it deems relevant including, but not limited to, the following:
32 (1) Documents approved by the employer's governing body in accordance with requirements of public
33 meetings laws and maintained by the employer;
34 (2) Last payrate listed on a pay schedule that conforms to the requirements of subdivision (a) with the
35 same employer for the position at issue;
36 (3) Last payrate for the member that is listed on a pay schedule that conforms with the requirements of
37 subdivision (a) with the same employer for a different position;
38 (4) Last payrate for the member in a position that was held by the member and that is listed on a pay
39 schedule that conforms with the requirements of subdivision (a) of a former CalPERS employer."

1 In addition, there is no evidence the Settlement it was subject to public notice or
2 vetting or that it satisfied the criteria for a publicly available salary scheduled. (See,
3 *Prentice*, 157 Cal. App. 4th at p. 994 ["Prentice points out his full salary would have
4 been available to anyone examining the City's annual budget. However, as a practical
5 matter, inclusion of a provisional or temporary salary in a budget document would not
6 have afforded any other person holding the position the right to receive the same
7 increase, where, as here, the City itself consistently recognized that the salary range
8 did not include the raise. Because, as we view the entire statutory scheme, the
9 limitations on salary are designed to require that retirement benefits be based on the
10 salary paid to similarly situated employees, PERS acted properly in looking at the
11 published salary range rather than the exceptional arrangement the City made with
12 *Prentice* and reflected in the City's budget documents. The defect in *Prentice's* broad
13 interpretation of "pay schedule" is that it would permit an agency to provide additional
14 compensation to a particular individual without making the compensation available to
15 other similarly situated employees."]

16 Hurt and Bacon face the same issue. As in *Prentice*, *Molina*, *Pleasanton* and *In*
17 *re Adams*, this court should also reject Hurt and Bacon's attempt into claiming
18 payments paid pursuant to personal settlement agreement qualify as compensation
19 earnable.

20 **D. Characterization of the Settlement Payments as Pensionable or**
21 **Backpay Do Not Qualify Them as Compensation Earnable**

22 Characterization as Back-pay:

23 Even if the settlement payments are characterized as "back-pay," they do not
24 qualify as compensation earnable because, as previously discussed, there is no
25 evidence indicating the amount was paid to similarly situated Lieutenants or that it was

1 paid in accordance with a publically available pay schedule for services rendered as
2 Captains.

3 In *Molina*, a former employee settled a wrongful termination action pursuant to a
4 settlement payment. (*Molina*, 200 Cal. App. 4th at p. 56.) *Molina* was paid a lump sum
5 of \$200,000 he claimed as "back-pay" and requested CalPERS include it in the
6 calculation as compensation earnable. (*Id.*, at p. 58.) The court concluded that even if
7 \$200,000 of the settlement proceeds was considered "back-pay," that would not
8 necessarily increase his retirement benefits because the "payrate" for the position
9 *Molina* held was \$8,527.98 per month and "was not affected by the settlement payout."
10 (*Id.*, at p. 66.)

11 "Because, under PERL, even if a portion of the settlement amount had
12 been labeled back pay and was included in taxable income, it could not
13 be included in *Molina's* 'payrate' because there was no evidence that the
14 amount was either (1) paid to similarly situated employees or (2) paid in
15 accordance with a 'publicly available pay schedule] for services rendered
16 on a full time basis during normal working hours.' (Gov. Code, § 20636,
17 subd. (b)(1).)" (*Id.* at p. 67.)

18 The court further elaborated that:

19 "As one of CalPERS' witnesses explained in the administrative proceedings,
20 back pay could hypothetically affect a pension, but in order for *Molina* to have a
21 qualifying '\$200,000 final compensation, he would have had to have been
22 reinstated into a [] position with the City of Oxnard whose publicly available pay
23 scale is \$200,000. And he would have had to have worked in that position for 12
24 months. And that would entitle him to a re-retirement with the final
25 compensation of \$200,000." (*Id.* at p. 66.)

26 Thus, the compensation in back-pay fails to meet the definition of payrate
27 Because the proceeds were not paid for services rendered as Captains. Furthermore,
28 it was paid pursuant to a Settlement agreement with confidential terms and conditions,
29 rather than a publicly available pay scale. For the back-pay to qualify as final
30 compensation, Hurt and Bacon would have had to been promoted into the position of
31 Captains with the City and would have had to work in that position for twelve months.

1 Hurt and Bacon were placed on administrative leave. Even if we assume Hurt and
2 Bacon performed the duties of a Captain while they were on administrative leave, they
3 still fall short of meeting the 12 month requirement as Hurt was on administrative leave
4 for nine months and Bacon was on administrative leave for three months. For these
5 reasons, the settlement payments do not qualify as final compensation.

6 Characterization as Pensionable:

7 Public policy disfavors permitting a contracting employer, such as the City, to
8 determine what elements of its compensation package should be considered
9 compensation for retirement purposes. “[P]ublic agencies are not free to define their
10 employee contributions as compensation or not compensation under PERL-the
11 Legislature makes those determinations.” (Oden, 23 Cal. App. 4th at p. 201.) Thus,
12 characterization of compensation, in an employment agreement, as pensionable is
13 irrelevant and not binding on CalPERS.

14 Allowing conduct of the City to estop PERS would, in effect, permit the City to
15 usurp PERS' statutory authority to determine compensation for retirement purposes.
16 “To find an estoppel by privity in this context could have the pernicious effect of
17 inducing subordinate governmental entities to disregard the rule of law.” (Hudson 59
18 Cal. App.4th at pp. 1310, 1330-32, quoting *California Tahoe Regional Planning Agency*
19 *v. Day & Night Electric, Inc.* (1985) 163 Cal. App. 3d 898, 905.)

20 Thus, it is irrelevant whether the settlement pay is characterized as back-pay or
21 pensionable because it was not paid to similarly situated Lieutenants and it was not
22 paid in accordance with a publically available pay schedule for services rendered on a
23 full time basis.

24 ///

25

1 **F. Collateral Estoppel Is Unavailable under the PERL**

2 **Reliance Was Not Reasonable:**

3 In a desperate attempt to ensure their settlement scheme does not fall apart by
4 CalPERS refusal to recognize the increased compensation as payrate, Respondents
5 will likely point the finger at CalPERS and invoke the estoppel argument. Estoppel,
6 however, cannot provide Hurt and Bacon a benefit otherwise unavailable under the
7 express provisions of the PERL. (*Chaidez v. Board of Administration of California*
8 *Public Employees' Retirement System* (2014) 223 Cal.App.4th 1425, 1432, review
9 denied (May 14, 2014.)

10 A party asserting the doctrine of equitable estoppel must establish: (1) the party
11 to be estopped was apprised of the facts; (2) the party to be estopped intended or
12 reasonably believed that claimant would act in reliance on its conduct; (3) the claimant
13 was ignorant of the true state of facts; and (4) the claimant actually and reasonably
14 relied on the conduct of the party to be estopped to his detriment. (*City of Long Beach*
15 *v. Mansell* (1970) 3 Cal.3d 462, 489.) Where estoppel is sought to be asserted against
16 a governmental entity, a fifth element must be established - 5) the interests of a private
17 party must outweigh by effect on public interests and policies. (*Id.* at 496-97.) It is the
18 burden of the party asserting estoppel to affirmatively establish each of its elements.
19 (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051 fn.5. ["[W]here one
20 of the elements of an estoppel is missing there can be no estoppel."]; *People ex rel.*
21 *Franchise Tax Bd. v. Superior Court* (1985) 164 Cal. App.3d 526, 552.)

22 In this case, Hurt and Bacon presented the testimony of Senator Roth to
23 demonstrate that, at some point prior to entering the agreement, the City confirmed
24 with CalPERS that the proceeds would qualify as final compensation. Senator Roth's
25 testimony concerning the events, however, is vague and ambiguous. Senator Roth

1 could not recall the name of the City's human resources staff, the date and time of the
2 call, the name of the CalPERS' representative, the title of the representative, who
3 spoke during the discussion, or what the representative stated. (Transcript 87:18-25;
4 88:1-23; 89:16-17). There is no written record of the discussion. Furthermore,
5 CalPERS did not provide anything in writing, to any party, stating Hurt and Bacon will
6 receive retirement benefits based on the Captain's pay scale. (Exhs. 11 & 12,
7 Transcript 94:17-21; 95:15-25; 96:1-13).

8 Although it is unclear as to whether Hurt was actually made aware of the
9 alleged representations, Bacon testified that their attorney, Russell Perry was apprised
10 of the statements. (Transcript pp. 25:2-25, 80:10-25, 81:1-6.) Nonetheless, it was
11 unreasonable for Hurt and Bacon's attorney, Mr. Perry, to rely on what he heard
12 through the grape vine. Senator Roth testified that he informed Mr. Perry that the
13 settlement agreement is acceptable to CalPERS. He, however, also informed Mr.
14 Perry that he should "do his due diligence" and independently confirm this with
15 CalPERS. (Transcript p. 98:4-13.) Senator Roth opined that it was Mr. Perry's
16 obligation to conduct an independent investigation or inquiry to verify the information
17 he provided to Mr. Perry. (Transcript p. 98:18-22). Furthermore, there is no evidence
18 that Mr. Perry actually relied on the statements of the CalPERS' representative or
19 whether he relied on independent research. Regardless, it was unreasonable for Mr.
20 Perry, an attorney at law, to rely on Senator Roth's representations on a legal matter
21 as he should have researched the law himself, especially considering he was notified
22 by Senator Roth to do so. Therefore, the reliance was unreasonable.

23 Estoppel Is Not Available Here as a Matter of Law:

24 Regardless of reliance, Estoppel is unavailable here because providing such
25 relief would require CalPERS to provide Hurt and Bacon with a pay increase that is

1 otherwise unavailable under the PERL. CalPERS has authority to "correct errors or
2 omissions of members, contracting agencies, or itself, but not to provide the party
3 seeking correction with a 'status, right, or obligation not otherwise available' under the
4 PERL" (*City of Pleasanton*, 211 Cal. App. 4th at 544.) CalPERS cannot accept the pay
5 increase as compensation earnable when that pay increase is only available to Hurt
6 and Bacon and unavailable to other Lieutenants. Doing so would provide Hurt and
7 Bacon a right contrary to the definition of payrate. (§20636, subd. (b).)

8 Furthermore, Estoppel, in this case, is specifically proscribed because it would
9 undoubtedly conflict with strong public interest by permitting the City to artificially
10 increase Hurt and Bacon's benefits by providing them with compensation increases
11 unavailable to other Lieutenants.

12 **F. Final Settlement Pay**

13
14 Even if considered compensation enable, Hurt and Bacon's settlement
15 proceeds are appropriately excluded as final settlement pay. Final settlement pay is
16 statutorily defined as "pay or cash conversions of employee benefits that are in excess
17 of compensation earnable, that are granted or awarded to a member in connection
18 with, or in anticipation of, a separation from employment. (§20626, subd. (f).) The
19 Legislature expressly charged the Board with the promulgation of regulations that
20 delineate more specifically what constitutes final settlement pay. (ibid.)

21 In addition to the statutory description of final settlement pay, California Code of
22 Regulations, Title 2, § 570 provides that [f]inal settlement pay is excluded from payroll
23 reporting to PERS, in either payrate or compensation earnable." Furthermore, the
24 proscribed payments may be based on accruals over a period of prior service and are
25 not limited to the compensation *paid during the period of final compensation" whether*

1 "paid in either lump-sum, or periodic payments." (*Ibid.*) It may also take the form of a
2 "retroactive adjustment to payrate, conversion of special compensation to payrate, or
3 any other method of payroll reported to PERS. (*Ibid.*)

4 Here, the payments were admitted, calculated, and adjusted in contemplation of
5 Hurt and Bacon's separation from employment. (Exhs. 15, 16, 17). Hurt and Bacon
6 both testified that they retired in exchange of receiving the settlement pay. (Transcript
7 43:14-19, 116:19-25, 117:1-13.) Thus, as a matter of law, CalPERS is required to
8 exclude the settlement pay from final compensation.

9 VI.

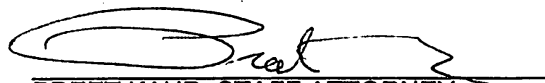
10 CONCLUSION

11 The City failed to promote Hurt and Bacon and when slammed by a lawsuit, the
12 City increased Hurt and Bacon's payrate pursuant to a confidential Settlement
13 agreement, rather than a publically available pay schedule. Hurt and Bacon were
14 classified as Lieutenants and performed the services of a Lieutenant, not of a Captain.
15 It is unfair and unlawful for CalPERS to base Hurt and Bacon's payrate on the top step
16 level of a Captain's pay scale while basing the payrate of other Lieutenants on the
17 lower classification. CalPERS has no authority to rewrite the PERL to ensure the
18 private Settlement agreement between the Respondents does not fall apart. In Hurt's
19 words, the "City needs to step up and do what needs to be done to correct this issue
20 because it hasn't been corrected." (Transcript 37:11-17.)

21 Respectfully submitted,

22
23 Dated:

9/14/2015

24 
PREET KAUR, STAFF ATTORNEY
Attorney for California Public Employees'
Retirement System

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4 Attorneys for California Public
5 Employees' Retirement System

6
7 BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

8	In the Matter of the Application for Final	)	CASE NO. 2012-0191
9	Compensation)	
		)	OAH NO. 2014090781
10	TIMOTHY BACON & DARRYL HURT,)	
		)	CALPERS' REQUEST FOR
11	Respondents,	)	OFFICIAL NOTICE (Gov. Code
		)	§11515)
12	and)	
		)	Hearing Date: May 28, 2015 at
13	CITY OF RIVERSIDE,	)	10:00 am
		)	Hearing Location: San Bernardino
14	Respondent.	)	Prehearing Conf.: None Scheduled
		)	Settlement Conf.: None Scheduled
15)	
16)	

17 TO THE COURT AND ALL COUNSEL AND PARTIES OF RECORD:
18 Petitioner California Public Employees' Retirement System (CalPERS) hereby
19 requests Official Notice pursuant to Gov. Code section 11515 and Evidence Code
20 section 452 and 453 be taken of the following documents. The significance, existence
21 and genuineness of these documents constitute facts not reasonably subject to dispute.
22 The true and correct copies of the documents are submitted as Exhibits in the above-
23 captioned matter and are discussed in the closing brief of CalPERS, filed and served
24 concurrently with this Notice.

25

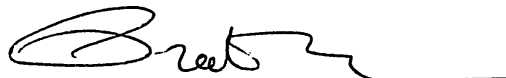
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The Board seeks Official notice of the following Materials:

1. Board of Administration CalPERS Decision Adopting as its Final Decision, the Proposed Decision in In re the Matter of Randy Adams (OAH 20122030095) (Attachment A);
2. Riverside City Charter – Personnel Merit System (Attachment B)
3. City of Riverside Municipal Code – Personnel System (Attachment C);
4. MOU – Lieutenant (Attachment D)

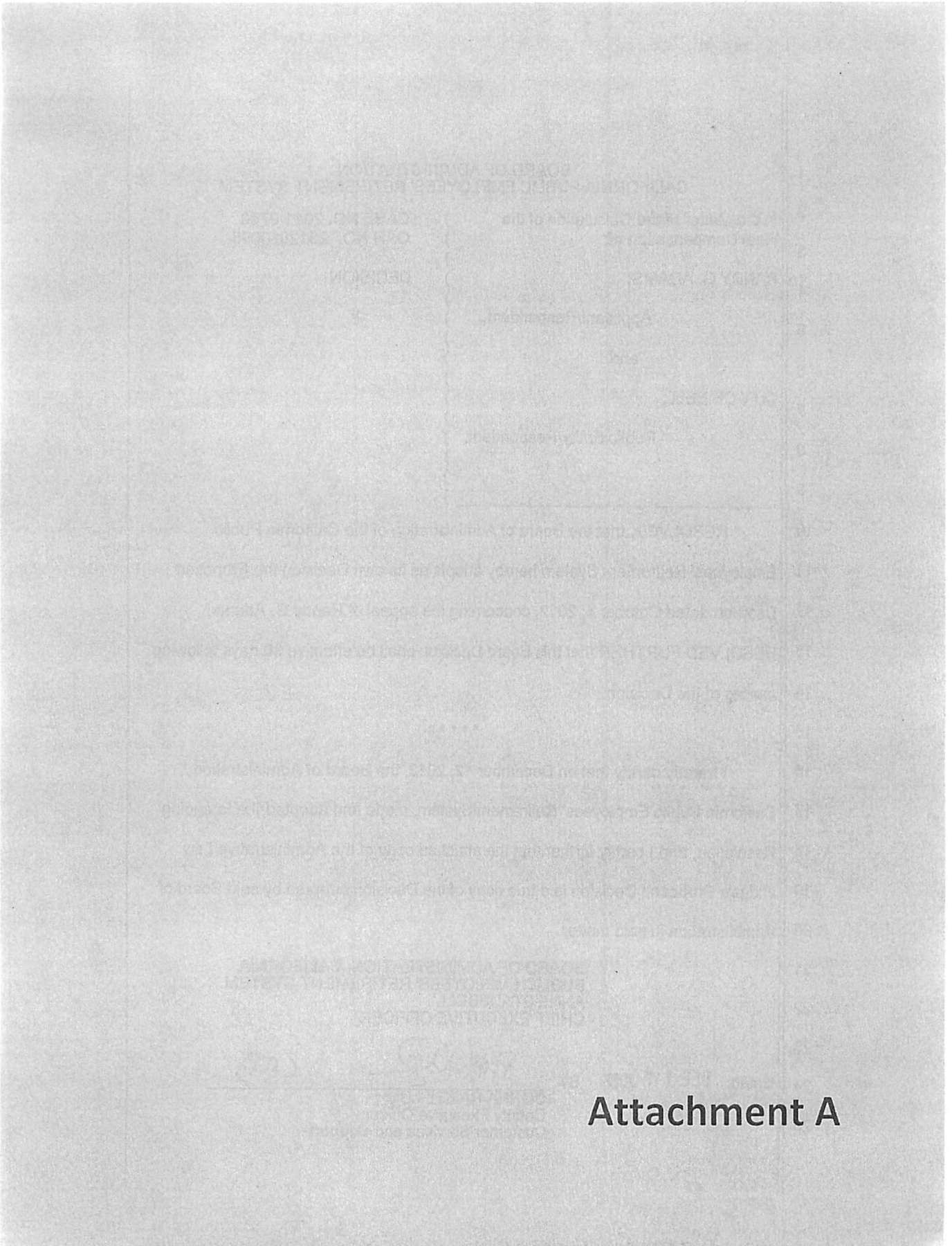
The attached 2014-2016 MOU was in effect in 2010; however, this copy is attached because CalPERS was not provided an MOU applicable in 2010. I spoke to Joseph Bolander, on September 14, 2015, and he confirmed this MOU may be referenced instead. Thus, the 2014-2016 MOU is attached for the purpose of referencing the promotional procedure applicable to Police Lieutenants. This is to further corroborate the testimony of Respondent Hurt concerning the promotional procedure applicable in 2010. A complete copy of the MOU can be obtained from <http://www.riversideca.gov/human/comp/compforms/RPAA.pdf>;

Respectfully submitted,



Dated:

PREET KAUR, STAFF ATTORNEY
Attorney for California Public Employees'
Retirement System



Attachment A

**BOARD OF ADMINISTRATION
PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA**

**In the Matter of the Calculation of the Final
Compensation of:**

RANDY G. ADAMS,

Applicant/Respondent,

and

CITY OF BELL,

Public Entity/Respondent.

Agency Case No. 2011-0788

OAH No. 2012030095

PROPOSED DECISION

James Ahler, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on September 19 and 20, 2012, in Orange, California.

Gregg McLean Adam, Attorney at Law, represented Applicant/Respondent Randy G. Adams, who was present throughout the administrative proceeding.

Stephen R. Onstot, Attorney at Law, represented Public Entity/Respondent City of Bell.

Wesley E. Kennedy, Senior Staff Counsel, represented Petitioner Marion Montez, Assistant Division Chief, Customer Account Services Division, California Public Employees' Retirement System, State of California.

The matter was submitted on September 28, 2012.

PRELIMINARY STATEMENT

Randy G. Adams enjoyed a long career in law enforcement. He served for many years as Chief of Police for the City of Simi Valley and as Chief of Police for the City of Glendale. On July 27, 2009, he began serving as the Chief of Police for the City of Bell.

Mr. Adams' last paid day of employment with the City of Bell was July 31, 2010. During his employment with the City of Bell, Mr. Adams earned "\$17,577.00 per pay period" (\$457,002.00 per year).

In December 2010, Mr. Adams applied to CalPERS for a service retirement based upon his many years of credited service. Mr. Adams contends that his service retirement allowance should be calculated on earnings reported to CalPERS by the City of Bell.

The City of Bell and CalPERS agree that Mr. Adams is entitled to a service retirement, but they assert that his retirement allowance should not be calculated upon earnings from the City of Bell because those earnings were not made pursuant to a publicly available pay schedule. In response, Mr. Adams claims that payment for his services was made pursuant to a legal employment agreement that was available to the public.

Mr. Adams did not establish by a preponderance of the evidence that his earnings from the City of Bell were made pursuant to a publicly available pay schedule. CalPERS correctly determined that Mr. Adams' earnings from the City of Bell did not constitute "compensation earnable" under the Public Employee Retirement Law. CalPERS correctly concluded that Mr. Adams' service retirement allowance should be based on his earnings from the City of Glendale and should include his year of service with the City of Bell.

FACTUAL FINDINGS

Background Information

1. The California Public Employees Retirement System (CalPERS) manages pension and health benefits for public employees, retirees, and their families. Retirement benefits are provided under defined benefit plans. A member's contribution is determined by applying a fixed percentage to the member's compensation. A public agency's contribution is determined by applying a contribution rate to the agency's payroll. Using certain actuarial assumptions, the Board of Administration sets employer contribution rates on an annual basis.

2. A member's service retirement allowance is calculated by applying a percentage figure, based upon the member's age on the date of his or her retirement, to the member's years of credited service and the member's "final compensation." CalPERS may review earnings reported by an employer to ensure that only those items allowed under the Public Employee Retirement Law (PERL) are included as "final compensation" for purposes of calculating a retirement allowance.

3. Randy G. Adams (Mr. Adams or Applicant) was employed by the City of Glendale as Chief of Police from January 31, 2003, through July 10, 2009. Mr. Adams' "compensation earnable" during that employment was \$19,574.61 per month (\$234,895.32 per year).

Mr. Adams submitted an application to CalPERS for a service retirement that was dated May 15, 2009, with an effective date of July 11, 2009. He briefly retired after filing that application.

4. On July 27, 2009, Mr. Adams submitted an application to CalPERS for reinstatement from retirement because he began employment as Chief of Police with the City of Bell. CalPERS approved and processed that application on September 17, 2009, with an effective date of reinstatement backdated to July 27, 2009.

5. The City of Bell is a public agency that contracted with CalPERS for the provision of retirement benefits to eligible employees under PERL.

6. Negotiations concerning Mr. Adams' employment with the City of Bell began in earnest in April 2009, shortly before Mr. Adams retired from employment with the City of Glendale. The negotiations resulted in the signing of an Agreement for Employment dated May 29, 2009.¹ Robert A. Rizzo (CAO Rizzo), Chief Administrative Officer, City of Bell, signed the agreement on behalf of the City of Bell. Some City Council members were aware of CAO Rizzo's decision to hire Mr. Adams as Chief of Police.

Payment to Mr. Adams under the May 29, 2009, employment agreement was not made pursuant to a publicly available pay schedule. Mr. Adams' employment agreement and the personnel action report related to his employment were not readily available for public review. The employment agreement was ultimately made available by the City of Bell in response to a formal public records request.

The May 29, 2009, employment agreement was for an unspecified term, with Mr. Adams' employment as Chief of Police to commence on July 27, 2009. Under the agreement, Mr. Adams' "basic salary" was "\$17,577.00 per pay period."² The agreement stated that Mr. Adams' basic salary could be adjusted "by the CAO, in his sole discretion . . . in an amount commensurate with Employee's performance."

The City of Bell's City Council did not approve or ratify the May 29, 2009, employment agreement.

¹ In addition to the May 29, 2009, employment agreement, two other signed employment agreements were produced that contained different contract dates, called for the provision of different services, and required separate payments that, when added together, totaled \$17,577 per pay period. These contracts were drafted and signed after Mr. Adams began employment with the City of Bell, and they did not constitute the employment agreement under which Mr. Adams was employed.

² The term "pay period" was not defined, but common usage established that a "pay period" was every two weeks. Mr. Adams basic pay was \$457,002 per year.

The City of Bell Scandal

7. In July 2010, two Los Angeles Times reporters wrote an article that claimed that City of Bell officials were receiving salaries that were among the highest in the nation. These and other articles led to widespread criticism and a demand that certain City of Bell officials resign. Mr. Adams' hiring and his earnings became a focus of concern.

8. On July 23, 2010, Mr. Adams received a telephone call advising him that the City Council had decided in a closed session to announce that Mr. Adams' had resigned as Chief of Police. Mr. Adams denied resigning from employment and offered to meet with City of Bell attorneys to discuss his separation. On August 20, 2010, Mr. Adams learned that the City of Bell had not direct deposited his paycheck for the period August 12, 2010, through August 14, 2010.³

The Application for a Service Retirement

9. Mr. Adams submitted an application for a CalPERS service retirement dated December 5, 2010. Mr. Adams represented that his highest final compensation was the last 12 months of his employment with the City of Bell. He represented that his last day on the City of Bell payroll was July 31, 2010, noting that his employment was "terminated by failure to pay on 8-20-10." Mr. Adams requested that his service retirement allowance be calculated using his compensation with the City of Bell in the amount of \$38,083.50 per month.

CalPERS' Response to the Application

10. Following the receipt of Mr. Adams' application, CalPERS reviewed what the City of Bell reported it had paid to Mr. Adams. CalPERS concluded that Mr. Adams' earnings were not "compensation earnable" under PERL because those earnings were not set forth in publicly available pay schedules. CalPERS determined that Mr. Adams' earnings with the City of Glendale, another covered public agency, had been set forth in publicly available pay schedules. CalPERS determined that Mr. Adams' highest average 12 consecutive months of compensation with the City of Glendale was \$19,574.61 per month (\$234,895.32 per year); CalPERS used the City of Glendale earnings to calculate Mr. Adams' service retirement allowance.

11. By letter dated December 17, 2010, CalPERS advised Mr. Adams that the Office of Audit Services (OAS) completed a review of the City of Bell's payroll reporting and member enrollment processes; that the OAS review noted that the Office of the Attorney General had filed a civil action against various persons, including Mr. Adams; that the resolution of the civil action might result in an adjustment of Mr. Adams' "compensation

³ This Factual Findings simply provides context. It is drawn from the Claim in an Action for Money and Damages that was filed on Mr. Adams' behalf with the City of Bell on February 1, 2011.

earnable”; and that “CalPERS’ calculation of retirement benefits will take into account only compensation paid that it determines was proper and authorized, pursuant to properly approved and publicly available valid contracts entered into prior to 2005, or pursuant to publicly available schedules that can be substantiated as meeting the definition of compensation earnable” pending resolution of the civil action. The letter stated that CalPERS would use compensation from the City of Glendale to calculate Mr. Adams’ retirement allowance. The letter notified Mr. Adams of his appeal rights.

12. By letter dated February 15, 2011, Mr. Adams timely appealed from CalPERS’ determinations and requested an administrative hearing.

13. On July 12, 2012, Petitioner Marion Montez, CalPERS’ Assistant Division Chief, Customer Account Services Division, signed the Statement of Issues giving rise to this administrative proceeding.

Mr. Adams’ Employment History

14. After working briefly for the Los Angeles County Schools, Mr. Adams began his law enforcement career in July 1972 with the City of Buenaventura Police Department. He worked there for 23 years, rising to the ranks of Lieutenant and serving on the Command Staff. Mr. Adams met Pier’Angela Spaccia (Ms. Spaccia) during his employment with the City of Ventura. Mr. Adams was employed as Chief of Police by the City of Simi Valley from September 1995 through January 2003. Mr. Adams was employed as Chief of Police by the City of Glendale from January 2003 through July 2009. Mr. Adams was employed as Chief of Police by the City of Bell from July 2009 through July 2010.⁴

Mr. Adams was credited with 38.562 years of credited CalPERS service as a result of his public employment.

The Negotiations with the City of Bell

15. Mr. Adams met Ms. Spaccia in 1980 when both of them were employed by the City of San Buenaventura. Ms. Spaccia left that employment around 1990. She did not keep in close contact with Mr. Adams after that.

In 2003, Ms. Spaccia began working full time for the City of Bell as an assistant to CAO Rizzo. The City of Bell employed several persons, including CAO Rizzo, Ms. Spaccia, and the (then) Chief of Police, pursuant to written employment agreements.

⁴ According to benefit calculations provided by a CalPERS’ actuary, Mr. Adams was credited with 1.015 years of service with the City of Bell, 6.440 years of service with the City of Glendale, 7.406 years of service with the City of Simi Valley, 23.181 years of service with the City of San Buenaventura, and 0.52 years of service with the Los Angeles County Schools, totaling 38.562 years of CalPERS service.

Before 2009, Ms. Spaccia learned that Mr. Adams was being considered for a law enforcement position in Orange County. She knew Mr. Adams had served as the Chief of Police for the City of Simi Valley and was the Chief of Police for the City of Glendale. Ms. Spaccia told CAO Rizzo that she knew Mr. Adams personally and she spoke very highly of him. Mr. Adams did not get the position in Orange County and remained employed as the City of Glendale's Chief of Police

About a year later, sometime in 2009, CAO Rizzo announced, "We need a chief from outside." CAO Rizzo asked Ms. Spaccia about Mr. Adams. Ms. Spaccia said Mr. Adams enjoyed an impeccable reputation. CAO Rizzo asked Ms. Spaccia to make arrangements to meet with Mr. Adams. Ms. Spaccia agreed and made the arrangements.

Ms. Spaccia contacted Mr. Adams at his office in Glendale. She arranged for a series of meetings between Mr. Adams, CAO Rizzo, several City of Bell employees, and several City Council members. Ms. Spaccia attended some meetings and typed certain documents related to Mr. Adams' employment, but she was not involved directly in the negotiations that resulted in Mr. Adams becoming employed as the City of Bell's Chief of Police.

16. A review of the emails between Ms. Spaccia and Mr. Adams highlight the negotiations that took place. Some emails demonstrate a conscious effort to shield salaries paid to certain City of Bell employees, including Mr. Adams, from public view.⁵

On April 14, 2009, Mr. Adams sent Ms. Spaccia an email. An attachment to the email was addressed to CAO Rizzo. In the attachment, Mr. Adams thanked CAO Rizzo for the employment opportunity; he stated that his PERS compensation was projected to be \$270,000 per year; that the Chief of Police for the City of Bell made \$160,000 to \$190,000 per year; and that he was requesting a starting salary of \$370,000 per year "plus the deferred compensation package we have discussed." Mr. Adams wrote, "The big difference, and I certainly value this, is that what I earn in this position will be 'persalbe.'" Mr. Adams mentioned a deferred compensation plan of \$69,000 per year, "most of which is 'persalbe.'" Mr. Adams requested that the City of Bell pay employee costs for his CalPERS retirement and provide him and his dependents with lifetime medical, dental and vision insurance. The attachment suggested that employment commence on September 1, 2009, and that it be renewable yearly, subject to 30 days notice of termination by either party.

On April 14, 2009, Ms. Spaccia sent Mr. Adams an email that stated: "By the way . . . after our morning meeting tomorrow Bob [CAO Rizzo] would like us to go to the Starbuck's to meet with the POA President and Vice-President . . . then we will go get [City Councilman M] and have lunch . . . hope that will work."

⁵ Ms. Spaccia, who served as the City of Bell's Assistant Chief Administrative Officer at the time, was responsible for typing employment agreements for certain City of Bell management employees including CAO Rizzo, herself, Chiefs of Police and Directors. The task was not assigned to clerical staff. The assignment of this seemingly routine chore to Ms. Spaccia helped keep the salaries confidential.

On April 15, 2009, Mr. Adams sent Ms. Spaccia an email. He ended the email as follows: "I am looking forward to seeing you and taking all of Bell's money?! Okay . . . just a share of it!!"

On April 16, 2009, Ms. Spaccia sent an email to Mr. Adams that responded to the attachment to CAO Rizzo. The email stated:

LOL . . . well you can take your share of the pie . . . just like us!!! We will all get fat together . . . Bob has an expression he likes to use on occasion . . .

Pigs get Fat . . . Hogs get slaughtered!!!! So long as we're not Hogs . . . all is well!

Have a nice night . . . see you tomorrow

On April 22, 2009, Mr. Adams sent Ms. Spaccia an email, thanking her "for helping me with the amazing opportunity." A draft memorandum of understanding was attached that stated that the City of Bell was aware that Mr. Adams had suffered several injuries that prevented him from heavy lifting; that the injuries were the result of industrial incidents occurring during Mr. Adams' employment at Buenaventura, Simi Valley, and Glendale; that "the City of Bell recognizes that Mr. Adams qualifies for, and will be filing for, a medical disability retirement"; and that the "City of Bell agrees to support his retirement and agrees that a service/medical retirement is justified and appropriate."

On April 23, 2009, Ms. Spaccia advised Mr. Adams that several documents needed to be prepared including an employment contract, an independent contractor (consultant) letter, a medical retirement acceptance letter, and a vehicle indemnification letter. Ms. Spaccia wrote: "As you might have surmised already, there are very specific reasons why it would not all be addressed as one all-encompassing contract, but I want to meet and be sure that you are comfortable with it." The plan to have the agreements spread amongst several documents, rather than having them set forth in a single document, demonstrated a desire to maintain secrecy about the details of Mr. Adams' employment agreement.

Ms. Spaccia attached a proposed employment agreement to an email dated May 14, 2009, that stated: "Take a look and call me when you have a few minutes . . . no rush."

By email dated May 27, 2009, Mr. Adams returned the contract to which he had made several changes. In that email, Mr. Adams represented that his legal advisor informed him that a general law city must have a contract signed by the mayor of that city on behalf of the city council, unless an enabling document authorized the Chief Administrative Officer to act for the City Council. According to the email, "I told [the legal advisor] that was the case and that Bob [CAO Rizzo] was in total control in the City of Bell. He said that was great, but feels I should have a copy of the agreement that gives Bob that authority as an attachment to my contract." The email asked Ms. Spaccia whether "we should make the Worker's Comp

letter a separate matter of understanding that we just sign and keep separate?" Mr. Adams' comment about need to have the worker's compensation letter separate signified his desire to keep certain details of his employment agreement confidential.

By email dated May 27, 2009, Ms. Spaccia stated that the revisions Mr. Adams proposed "were fine with the following exceptions: . . . 2) Do not include the last sentence you added in Section 5.⁶ We have crafted our Agreements carefully so we do not draw attention to our pay. The word Pay Period is used and not defined in order to protect you from someone taking the time to add up your salary." The email also stated that it was a shame Mr. Adams' legal advisor was "so unwilling to recognize what you (I think) already have. We have painstakingly and carefully, and with attorney assistance made sure of what authority Bob has vs. what the City Council has. So, for your attorney's information, Bob has the proper authority to enter into a contract with you, and we are not interested in educating him on how we did that. If you would like to meet separately or discuss on the phone we can do that."

Ms. Spaccia's comments demonstrated that certain City of Bell officials did not want attention drawn to their pay; that employment agreements were carefully drafted to prevent the easy computation of salaries; and that CAO Rizzo did not want to provide Mr. Adams' legal advisor with any written documents concerning his purported authority to contract on behalf of the City of Bell. Ms. Spaccia's testimony that the drafting of the employment agreement was not intended to hide Mr. Adams' salary from the public and that it was drafted in the fashion it was merely to keep the salary from an individual who sought the position of Chief of Police did not make a great deal of sense.

17. The May 29, 2009, agreement that Mr. Adams and CAO Rizzo signed was not prepared by or provided to Edward W. Lee (Attorney Lee), an attorney with Best, Best & Krieger, who served as the City Attorney for the City of Bell.

On Friday July 10, 2009, Attorney Lee sent an email to CAO Rizzo that asked: "Is there a contract you need me to work on for the Chief and will this be on the upcoming Council agenda?"

On Sunday, July 12, 2009, CAO Rizzo provided an email response to the questions posed by Attorney Lee concerning the "Police Chief Contract" as follows:

The contract has been prepared and signed . . .
Remember the City Council by resolution gave me the
authorization to execute any and all contracts and
agreements on their behalf. There is no need for the
council to discuss it, unless they want to discuss my
termination and severance package first

⁶ Section 5 of the written employment agreement provided, in part, "Employee shall be paid (hereinafter the "Basic Salary") \$17,577.00 per pay period."

These email exchanges were significant: they established that the City Attorney was unaware that Mr. Adams' employment contract had been prepared and signed; further, the exchange implies that the City Attorney was unaware or had forgotten that there was no "need for the council to discuss" the employment agreement; finally, CAO Rizzo threatened to resign from employment if there was a discussion about the agreement. CAO Rizzo's email underscored his purported belief that city council approval of Mr. Adams' employment agreement was unnecessary.

On Monday, July 13, 2009, CAO Rizzo expanded his response in an email to Attorney Lee that stated in part:

Ed

I have never been asked by the city Council to show, review, discuss, or anything else with any other Department head contracts since the Charter became effective, here is the list.

- 1. Spaccia**
- 2. Lourdes**
- 3. Eric**
- 4. Luis Ramirez**
- 5. Annette Pertez**
- 6. The two Chiefs before Andy Probst**
- 7. Andy Probst**
- 8. The three Deputy Chiefs**
- 9. Assistant Chief Chevez**
- 10. The last three captains, and**
- 11. The last four lieutenants' contracts**

[redacted] ... [redacted]

Ed – with our 15 years of working together and the City of Bell's continuing with you at BBK [Best, Best & Krieger] just because of our relationship. I wish you would have told [City Councilman M] you would look into it and get back with him; then discuss it with me so I could have warned you prior to your making suggestions which were nothing more than you falling into a political trap and now making me place my job on the line because of internal politics.

[redacted] ... [redacted]

your pal,

Bob

Other Employment Documents

18. Two other agreements related to Mr. Adams' employment with the City of Bell were produced following the public records request. The first, an employment agreement dated April 28, 2009, claimed to employ Mr. Adams as "Special Police Counsel to CAO" commencing July 27, 2009, at a basic salary of \$9,844.68 per pay period. The second, an employment agreement dated April 28, 2009, claimed to employ Mr. Adams as "Chief of Police" commencing July 27, 2009, at a basic salary of \$4,692.31 per pay period.

19. These two agreements were not mentioned in the email exchanges between Ms. Spaccia and Mr. Adams. Ms. Spaccia testified that she did not prepare the agreements and had no knowledge about them. This testimony was credible.

20. Rebecca Valdez, the City Clerk for the City of Bell, certified that the two agreements referred to in Factual Finding 18 were true and correct copies of employment agreements "in file in the official records of the City of Bell, California." However, the certification was not accurate. Ms. Valdez testified in this proceeding that the agreements containing the certifications were not maintained in any file for which she was responsible and that those documents were provided to her by CAO Rizzo.

21. Mr. Adams' employment agreement and the personnel action report related to his employment as Chief of Police were not available for public review without a public records request or some other demand, such as a subpoena, first being filed with the City of Bell.

It took the City of Bell staff about three weeks and a review by counsel before Mr. Adams' employment agreements were produced in response to the public records request. It was not established that the personnel action report related to Mr. Adams' employment, which was maintained in a confidential personnel file, was provided in response to a public records request, although it may have been.

The Absence of Publicly Available Pay Schedules and City Council Approval

22. The City of Bell had no pay schedule that set forth a salary or salary range for Chief of Police that was in effect when Mr. Adams signed the employment agreement.

Margaret Junker (Ms. Junker), a Chief Auditor with CalPERS, was in charge of the 2010 CalPERS audit of the City of Bell. That audit was, in part, initiated by the Los Angeles Times articles, the City of Bell scandal, and the filing of the Attorney General's civil action. The audit went back 17 years.

Ms. Junker testified that several City of Bell police chiefs had served under written employment agreements since 2006, including Mr. Adams. In the audit, CalPERS requested that the City of Bell provide evidence to establish that payment to Mr. Adams was made pursuant to publicly available pay schedules or that the employment agreement(s) was approved by City Council as required by law. No evidence was produced to establish those matters.⁷

23. Applicant's counsel suggested, through Ms. Spaccia's testimony and through the introduction of Resolution No. 2006-42⁸, that CAO Rizzo possessed the legal authority to

⁷ **It is irrelevant to the determination in this proceeding that CalPERS did not adjust the retirement allowances of several police chiefs employed by the City of Bell who served under employment agreements for which there was no public pay schedule or City Council approval in a public meeting.**

⁸ **Resolution No. 2006-42 provided:**

Whereas, the second paragraph of Section 519 of the City's Charter allows the Bell City Council to authorize by resolution the Chief Administrative officer to bind the City, with or without written consent, for the acquisition of . . . labor, services or other items included within the budget approved by the City Council;

Whereas, the City Council has determined that it is in the interest of efficient administration for the City to authorize the Chief Administrative Officer to bind the City with a written contract for the acquisition of labor or services;

Now, therefore, the City Council of the City of Bell does resolve as follows:

1. Pursuant to the second paragraph of Section 519 of the City's Charter, the Bell City Council hereby authorizes the Chief Administrative Officer to bind the City by written contract for the acquisition of labor or services included within the budget approved by the Bell city Council.

[¶] . . . [¶]

3. The authority granted by this resolution shall not apply to any written contract for services rendered by

enter into a binding employment agreement with Mr. Adams on behalf of the City of Bell because the agreement involved "the acquisition of . . . labor, services or other items included within the budget approved by the City Council." To support this argument, Applicant argued that the City Council adopted a five-year budget plan on May 2, 2005, that included "Police Services." The Police Services budget did not set forth the salary that was to be paid to the Chief of Police.

While it might be established elsewhere that the employment agreement signed by CAO Rizzo was valid and binding upon the City of Bell, that conclusion need not be reached in this proceeding. Even if it were determined that the contract signed by CAO Rizzo was binding on the City, that determination would not be the equivalent of public notice and formal approval of the employment agreement by the City Council.

24. The fact that Mr. Adams met with several City Council members (but never more than two at a time) before he signed the employment agreement did not establish City Council approval of Mr. Adams' employment contract.

26. Ms. Valdez, the City Clerk, testified that the City Council did not set Mr. Adams' salary or approve his employment agreement. There was no evidence to the contrary.

27. Lourdes Garcia (Ms. Garcia), who was employed by the City of Bell as the Director of Administrative Services, testified that CAO Rizzo directed her to prepare the contracts identified in Factual Finding 18. Ms. Garcia provided the unsigned agreements to CAO Rizzo; she had no idea what happened to them after that.

28. Ms. Valdez and Ms. Garcia testified that Mr. Adams' salary seemed to be much greater than salaries previously paid to persons serving as City of Bell police chiefs.

Expert Testimony

29. Kung-Pei Hwang (Mr. Hwang) is a Senior Pension Actuary with CalPERS.

Mr. Hwang determined that the total length of time Mr. Adams worked for CalPERS agencies including the Los Angeles County Schools, the City of San Buenaventura, the City of Simi Valley, the City of Glendale, and the City of Bell, comprised Mr. Adams' 38.562 years of credited CalPERS service.

Using earnings from the City of Glendale as a basis for computation, Mr. Hwang determined that Mr. Adams's service retirement benefit calculation (option 3) was \$22,347.94 per month (\$258,175.28 per year).

any person in the employ of the City at a regular
salary

Using earnings from the City of Bell as a basis for computation, Mr. Hwang determined that Mr. Adams service retirement benefit calculation (option 3) was \$42,522.55 per month (\$510,270.60 per year).

Mr. Hwang's testimony had no relevance to the issue of whether there was payment under a publicly available pay schedule. It showed, however, that dramatically increasing the amount of a public employee's salary in the last year of employment will have a significant impact. In Mr. Adams' case, using his earnings with the City of Bell as a basis for calculating a service retirement almost would have doubled the amount of his service retirement allowance and it would have resulted in an unfunded liability having a present value of \$3,182,706, according to Mr. Hwang.

30. Terrance Rodgers (Mr. Rodgers) is a CalPERS Staff Services Manager with CalPERS' Compensation Review unit. He and his staff are involved in determining a member's "compensation earnable." Mr. Rodgers testified that in order for a member's earnings from a public agency to constitute "compensation earnable," the earnings must be paid by the public entity under publicly available pay schedules. Mr. Rodgers testified that California Code of Regulations, title 2, section 570.5, became operative on August 10, 2011.

California Code of Regulations, Title 2, Section 570.5

31. California Code of Regulations, title 2, section 570.5 provides:

(a) For purposes of determining the amount of "compensation earnable" . . . payrate shall be limited to the amount listed on a pay schedule that meets all of the following requirements:

(1) Has been duly approved and adopted by the employer's governing body in accordance with requirements of applicable public meetings laws;

(2) Identifies the position title for every employee position;

(3) Shows the payrate for each identified position, which may be stated as a single amount or as multiple amounts within a range;

(4) Indicates the time base, including, but not limited to, whether the time base is hourly, daily, bi-weekly, monthly, bi-monthly, or annually;

(5) Is posted at the office of the employer or immediately accessible and available for public review

from the employer during normal business hours or posted on the employer's internet website;

(6) Indicates an effective date and date of any revisions;

(7) Is retained by the employer and available for public inspection for not less than five years; and

(8) Does not reference another document in lieu of disclosing the payrate.

(b) Whenever an employer fails to meet the requirements of subdivision (a) above, the Board, in its sole discretion, may determine an amount that will be considered to be payrate, taking into consideration all information it deems relevant including, but not limited to, the following:

(1) Documents approved by the employer's governing body in accordance with requirements of public meetings laws and maintained by the employer;

(2) Last payrate listed on a pay schedule that conforms to the requirements of subdivision (a) with the same employer for the position at issue;

(3) Last payrate for the member that is listed on a pay schedule that conforms with the requirements of subdivision (a), with the same employer for a different position;

(4) Last payrate for the member in a position that was held by the member and that is listed on a pay schedule that conforms with the requirements of subdivision (a) of a former CalPERS employer.

32. Section 570.5 was sponsored by CalPERS and approved by the Office of Administrative Law on July 11, 2011. The regulation became effective on August 10, 2011.

33. The Notice of Proposed Regulatory Action related to section 570.5 stated that the regulation "will ensure consistency between CalPERS employers as well as enhance disclosure and transparency of public employee compensation . . . This proposed regulatory action clarifies and makes specific requirements for publicly available pay schedule and labor policy or agreement . . ."

The informative digest portion of that notice stated in part:

Generally the law requires that a member's payrate be shown on a publicly available pay schedule, that special compensation be limited to items included in a labor policy or agreement, and that all records establishing and documenting payrate and special compensation be available for public scrutiny. Employers have not uniformly adhered to these requirements

The Arguments

34. Applicant argued that CalPERS' theories evolved since the publication of CalPERS' determination letter, which alleged only "over-reporting"; that the City of Bell never "over-reported" Mr. Adams' salary; that the May 29, 2009, employment agreement was the only agreement at issue in this matter; that the May 29, 2009, agreement constituted a "publicly available pay schedule" under legal standards that existed when Mr. Adams filed his application for retirement; that the May 29, 2009, employment agreement was "voluntarily" produced following a public records act request; and that the claim of "spiking" does not justify the retroactive application of the newly enacted pay schedule regulation.

35. The City of Bell argued that CAO Rizzo was not authorized to enter into an employment agreement with Mr. Adams on behalf of the City of Bell; that the City Council for the City of Bell never approved or ratified the May 29, 2009, employment agreement; that a Chief of Police salary of \$457,000 per year was not included in the City of Bell's 2009 budget; that the May 29, 2009, employment agreement was not publicly available; that Mr. Adams remuneration from the City of Bell was not "compensation earnable" for CalPERS retirement purposes; and that Mr. Adams had no right to claim any retirement benefits from his arrangement with CAO Rizzo because Mr. Adams was not a City of Bell employee.

36. CalPERS argued that "compensation earnable" means the "normal" monthly rate of pay or base pay of the member paid in cash to similarly situated members of the same group or class of employment for services rendered on a full-time basis during normal working hours; that payrates must be stable and predictable among all members of a group or class and must be publicly noticed; that Mr. Adams's payrate was not "normal and he was not paid pursuant to a publicly available pay schedule; that payment to Mr. Adams did not involve City Council approval at a public meeting following notice; that California Code of Regulations, title 2, section 570.5 clarified existing law and did not impose new standards; and that Mr. Adams' salary with the City of Bell involved "final settlement pay" which is excluded his earnings from "payrate" and "special compensation."

Factual Conclusions

37. Mr. Adams was employed as Chief of Police by the City of Bell for approximately one year. His earnings from the City of Bell were not paid pursuant to a

publicly available pay schedule. His employment contract did not constitute a publicly available pay schedule. His employment contract was not approved or ratified by the City Council and it was not readily available for public review. There was a deliberate effort by CAO Rizzo and others to conceal Mr. Adams' employment agreement and payrate.

CalPERS correctly determined that payment to Mr. Adams by the City of Bell was not "compensation earnable" under PERL and that Mr. Adams was entitled to approximately one year of credited service for his service with the City of Bell. CalPERS properly used Mr. Adams' highest earnings with the City of Glendale to compute the amount of Mr. Adams' service retirement allowance.

LEGAL CONCLUSIONS

The Constitutional Mandate

1. Article XVI, section 17 of the California Constitution provides as follows:

The assets of a public pension or retirement system are trust funds and shall be held for the exclusive purpose of providing benefits to participants . . . and defraying reasonable expense of administering the system.

Administration of the Retirement Fund

2. The CalPERS retirement fund was established as a trust, to be administered in accordance with the provisions of the Public Employees Retirement Law solely for the benefit of the participants. (Gov. Code, § 20170.) Management and control of the retirement system is vested in the Board of Administration. (Gov. Code, § 20123). The Board of Administration has the exclusive control of the administration and investment of the retirement fund. (Gov. Code, § 20171.)

Burden and Standard of Proof

3. Government Code section 20128 provides in part:

. . . [T]he board may require a member . . . to provide information it deems necessary to determine this system's liability with respect to, and an individual's entitlement to, benefits prescribed by this part.

4. Applicant has the initial burden to establish that he was entitled to a CalPERS service retirement and the amount of the retirement allowance. (Evid. Code, § 500; Evid.

Code, § 550.) The standard of proof is a "preponderance of the evidence." (Evid. Code, § 115.)⁹

5. Once Applicant introduces prima facie evidence sufficient to establish that he is entitled to a service retirement in some amount, the burden shifts to CalPERS and the City of Bell to refute the evidence that was offered or to explain why no reply to the prima facie evidence is necessary.

As explained in *Sargent Fletcher, Inc. v. Able Corp.* (2003) 110 Cal.App.4th 1658, 1667-1668:

The terms burden of proof and burden of persuasion are synonymous. [Citations.] Because the California usage is "burden of proof," we use that term here.

"Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." (Evid. Code, § 500.) To prevail, the party bearing the burden of proof on the issue must present evidence sufficient to establish in the mind of the trier of fact or the court a requisite degree of belief (commonly proof by a preponderance of the evidence). (Evid. Code, §§ 115, 520.) The burden of proof does not shift during trial - it remains with the party who originally bears it. [Citations.]

Historically in California, the burden of producing evidence or burden of production also has been known as the "burden of going forward" with the evidence." [Citations.] Here, we use "burden of producing evidence" as that is the California code usage. (Evid. Code, § 110.)

Unlike the burden of proof, the burden of producing evidence may shift between plaintiff and defendant throughout the trial. (See Evid. Code, § 550; [Citations].) Initially, the burden of producing evidence as to a particular fact rests on the party with the burden of proof as to that fact. (Evid. Code, § 550, subd. (b); [Citations].) . . . But once that party produces evidence sufficient to make its prima facie case, the burden of producing evidence shifts to the other party to refute the prima facie case

⁹ Pension legislation must be liberally construed, resolving all ambiguities in favor of the applicant. However, liberal construction cannot be used as an evidentiary device. It does not relieve a party of meeting the burden of proof by a preponderance of the evidence. (*Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1332.)

... [Citations.] Even though the burden of producing evidence shifts to the other party, that party need not offer evidence in reply, but failure to do so risks an adverse verdict. [Citation.] Once a prima facie showing is made, it is for the trier of fact to say whether or not the crucial and necessary facts have been established

Determination of Service Benefits

6. A CalPERS member's retirement benefit is based upon the factors of retirement age, length of service, and final compensation. Compensation is not simply the cash remuneration received, but is exactly defined to include or exclude various employment benefits and items of pay. The scope of compensation is critical to setting the amount of retirement contributions for reasons related to employer funding. Statutory definitions delineating the scope of compensation cannot be qualified by bargaining agreements. Nor can the Board of Administration characterize contributions as compensation or not compensation under the PERL, as those determinations are for the Legislature. (*Pomona Police Officers' Assn. v. City of Pomona* (1997) 58 Cal.App4th 578, 584-585.)

Compensation Earnable

7. Government Code section 20630 provides in part:

(a) As used in this part, "compensation" means the remuneration paid out of funds controlled by the employer in payment for the member's services performed during normal working hours or for time during which the member is excused from work because of any of the following:

(1) Holidays.

(2) Sick leave.

(3) Industrial disability leave . . .

(4) Vacation.

(5) Compensatory time off.

(6) Leave of absence.

(b) When compensation is reported to the board, the employer shall identify the pay period in which the compensation was earned regardless of when reported or paid. Compensation shall

be reported . . . and shall not exceed compensation earnable, as defined in Section 20636.

8. Government Code section 20636 provides in part:

(a) "Compensation earnable" by a member means the payrate and special compensation of the member, as defined by subdivisions (b), (c), and (g), and as limited by Section 21752.5.

(b)(1) "Payrate" means the normal monthly rate of pay or base pay of the member paid in cash to similarly situated members of the same group or class of employment for services rendered on a full-time basis during normal working hours, pursuant to publicly available pay schedules. "Payrate," for a member who is not in a group or class, means the monthly rate of pay or base pay of the member, paid in cash and pursuant to publicly available pay schedules, for services rendered on a full-time basis during normal working hours, subject to the limitations of paragraph (2) of subdivision (e).

[¶] . . . [¶]

(c)(1) Special compensation of a member includes a payment received for special skills, knowledge, abilities, work assignment, workdays or hours, or other work conditions

Regulatory Authority

9. California Code of Regulations, title 2, section 570.5 – relating to publicly available pay schedules - is set forth in Factual Finding 31.

The proper application of the phrase "publicly available pay schedules" can be reached in this matter without reference to California Code of Regulations, title 2, section 570.5.

Statutory Interpretation - "Publicly Available" Pay Schedules

10. Under well-established rules of statutory construction, courts must ascertain the intent of the drafters to effectuate the purpose of the law. Because statutory language is generally the most reliable indicator of legislative intent, the words of a statute are first examined, giving them their usual and ordinary meaning and construing them in context. When statutory language is clear and unambiguous, there is no need for construction and courts should not indulge in it. Thus, if the language is unambiguous, the plain meaning governs and it is unnecessary to resort to extrinsic sources to determine legislative intent. (*Bernard v. City of Oakland* (2012) 202 Cal.App.4th 1553, 1560-1561.)

11. The word “available” means “suitable or ready for use” and “readily obtainable.” (*The Random House Dictionary of the English Language* (2nd Ed.), p. 142.) The word “publicly” modifies “available.” “Publicly” means “in a public or open manner or place” and “in the name of the community” and “by public action or consent.” (*The Random House Dictionary of the English Language* (2nd Ed.), p. 1563.)

The Legislature intended that a public employee’s “payrate” be readily available to an interested person without unreasonable difficulty. This concept does not apply to a situation in which a public employee’s payrate is buried in a carefully crafted agreement designed to prevent the easy calculation of that salary, that is set forth in an employment agreement that is privately maintained and is not based on a published pay schedule or approved in a public manner, and that is not subject to public disclosure except through a formal public records request, subpoena, or other legal process.

12. Assuming that there is some ambiguity in interpreting the phrase “publicly available” as Appellant maintains, then other construction aides should be considered including the objects to be achieved, the evils to be remedied, legislative history, the statutory scheme of which the statute is a part, contemporaneous administrative construction, and questions of public policy. (*Bernard v. City of Oakland, supra*, at 584-585.)

13. Official notice was taken of Senate Bill 53, which was introduced in 1992 and enacted in 1993. SB 53 was designed to curb “spiking,” the intentional inflation of a public employee’s final compensation, and to prevent unfunded pension fund liabilities. SB 53 defined “compensation earnable” in terms of normal payrate, rate of pay, or base pay so payrates would be “stable and predictable among all members of a group or class” and “publicly noticed by the governing body.” The legislation was intended to restrict an employer’s ability to spike pension benefits for preferred employees and to result in equal treatment of public employees. (Senate File History Re: SB 53)

14. The reference to “publicly available pay schedules” set forth in Government Code section 20636, subdivision (b)(1), was added by the Legislature in 2006. Legislative history confirms that “the change was a matter of clarification.” (*Prentice v. Board of Admin., California Public Employees’ Retirement System* (2007) 157 Cal.App.4th 983, 990, fn. 4.)

15. Using a broad interpretation of “pay schedule” based upon the inclusion of a salary disclosed only in a budget has the vice of permitting an agency to provide additional compensation to a particular individual without making the compensation available to other similarly situated employees. And, a written employment agreement with an individual employee should not be used to establish that employee’s “compensation earnable” because the employment agreement is not a labor policy or agreement within the meaning of an existing regulation and would not limit on the compensation a local agency could provide to an individual employee by way of individual agreements for retirement purposes. (*Prentice v. Board of Admin., California Public Employees’ Retirement System* (2007) 157 Cal.App.4th 983, 994-995.)

16. The term “publicly available” has been determined to be consistent with “a published monthly payrate,” and a settlement payment that was not paid in accordance with a “publicly available pay schedule for services rendered on a full time basis during normal working hours” cannot be used to calculate the amount of a CalPERS retirement allowance. (*Molina v. Board of Admin., California Public Employees’ Retirement System* (2001) 200 Cal.App.4th 53, 66-67.)

17. The PERS system, via its definitions of “compensation earnable” and “final compensation,” contemplates equality in benefits between members of the “same group or class of employment and at the same rate of pay.” There is clearly an intent not to treat members within the same class and at the same pay dissimilarly, although there is no intent to grant parity between employees of different classes and rates of pay. (*City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App.3d 1470, 1492.)

18. Mr. Adams’ earnings from the City of Bell were not paid pursuant to a publicly available pay schedule; his contract dated May 29, 2009, did not constitute a publicly available pay schedule; his contract dated May 29, 2009, was not readily available for public review; there was a deliberate effort by City of Bell officials to conceal the details of Mr. Adams’ employment agreement as Chief of Police, including his payrate; the City Council for the City of Bell did not approve Mr. Adams’ employment agreement. Under these circumstances, it is concluded that Mr. Adams did not establish that his earnings from the City of Bell were made pursuant to a publicly available pay schedule.

Cause Exists to Affirm CalPERS Determinations


19. Mr. Adams did not establish by a preponderance of the evidence that his earnings with the City of Bell constituted “compensation earnable” and should be used in the calculation of his service retirement allowance. It was not established by a preponderance of the evidence that Mr. Adams’ earnings with the City of Bell were pursuant to a publicly available pay schedule.

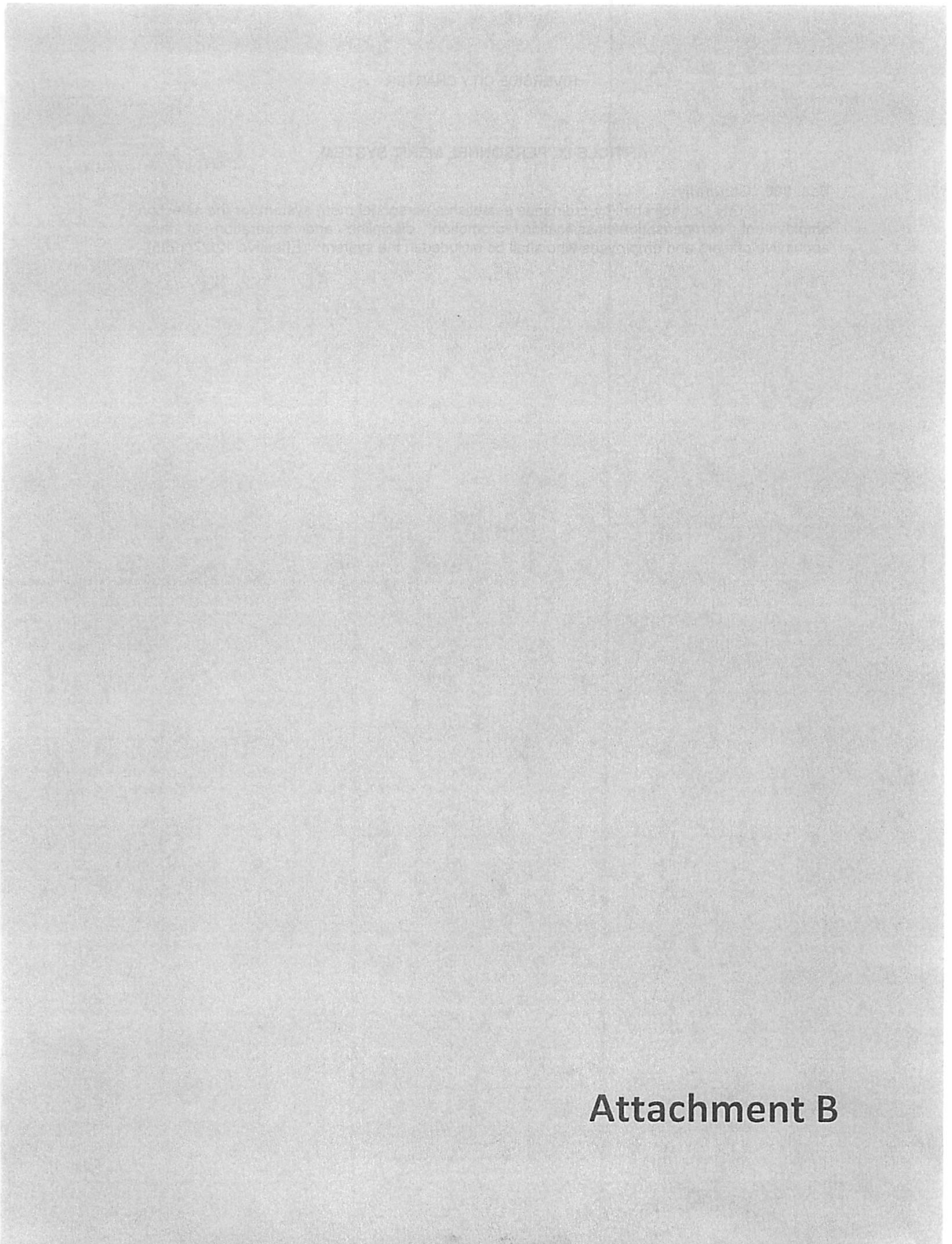
20. A preponderance of the evidence established that it was appropriate for CalPERS to include Mr. Adams’ length of service as Chief of Police with the City of Bell in retirement calculations and to use Mr. Adams’ highest 12 months of compensation with the City of Glendale in the calculation of his service retirement allowance.

ORDER

CalPERS' calculation of the service retirement allowance to which Randy G. Adams is entitled is affirmed.

Dated: October 4, 2012


JAMES AHLER
Administrative Law Judge
Office of Administrative Hearings



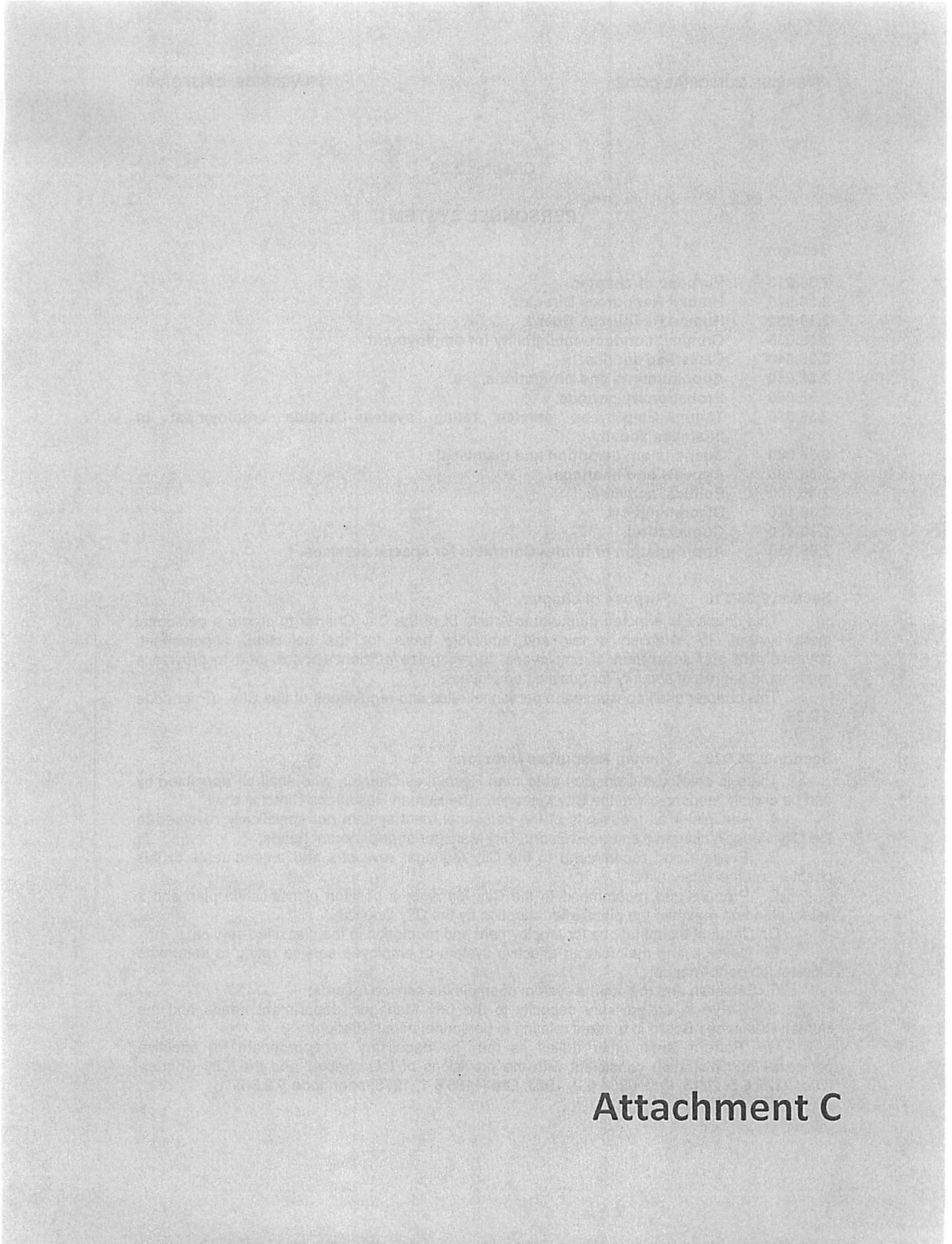
Attachment B

RIVERSIDE CITY CHARTER

ARTICLE IX. PERSONNEL MERIT SYSTEM.

Sec. 900. Generally.

The City Council shall by ordinance establish a personnel merit system for the selection, employment, compensation/classification, promotion, discipline and separation of those appointive officers and employees who shall be included in the system. (Effective 12/27/1995)



Attachment C

RIVERSIDE MUNICIPAL CODE

RIVERSIDE, CALIFORNIA

Chapter 2.36

PERSONNEL SYSTEM

Sections:

- 2.36.010 Purpose of chapter.**
- 2.36.020 Human Resources Director.**
- 2.36.030 Human Resources Board.**
- 2.36.035 Criminal conduct--Ineligibility for employment.**
- 2.36.040 Classified service.**
- 2.36.050 Appointments and promotions.**
- 2.36.060 Probationary periods.**
- 2.36.070 Tenure--Employees service rating system--Outside employment or business activity.**
- 2.36.080 Suspension, demotion and dismissal.**
- 2.36.090 Appeals and hearings.**
- 2.36.100 Political activities.**
- 2.36.110 Discrimination.**
- 2.36.120 Cooperation.**
- 2.36.130 Appropriation of funds--Contracts for special services.**

Section 2.36.010 Purpose of chapter.

This chapter is enacted pursuant to Article IX of the City Charter to create a personnel merit system, to establish a fair and equitable basis for the selection, appointment, advancement and separation of employees, to recognize efficient service, and to provide a reasonable degree of security for qualified employees.

This chapter shall constitute the personnel rules and regulations of this City. (Prior code § 2.35)

Section 2.36.020 Human Resources Director.

There is created the position of Human Resources Director, who shall be appointed by and be directly responsible to the City Manager. The Human Resources Director shall:

- A. Administer all provisions of the personnel merit system not specifically reserved to the City Council, Human Resources Board, City Manager or department heads;
- B. Prepare and recommend to the City Manager revisions and amendments to this chapter and the salary plan;
- C. Prepare and recommend to the City Manager a position classification plan and a salary plan and maintain the plans after adoption by the City Council;
- D. Conduct examinations for employment and promotion in the classified service;
- E. Develop and maintain an effective system of employee service rating to determine efficient job performance;
- F. Establish and maintain a system of employee service records;
- G. Serve in an advisory capacity to the City Manager, department heads and the Human Resources Board in matters relating to personnel administration;
- H. Perform such other duties as may be necessary or appropriate for effective personnel administration consistent with the provisions of this chapter and the City Charter. (Ord. 7229 § 5, 2013; Ord. 6064 § 2, 1993; Ord. 4185 § 1, 1975; prior code § 2.36)

RIVERSIDE MUNICIPAL CODE

RIVERSIDE, CALIFORNIA

Section 2.36.030 Human Resources Board.

There is created a Human Resources Board, which shall consist of nine members appointed by the Council pursuant to Article VII of the City Charter.

The Board shall hold regular meetings once each month and such other special meetings as may be required. The Human Resources Board shall:

A. Recommend to the City Council, after a public hearing thereon, the adoption, amendment or repeal of personnel rules and regulations;

B. Act in an advisory capacity to the City Council on matters concerning personnel administration;

C. Hear grievances and appeals submitted by any person in the classified service and make findings and recommendations which shall be advisory only;

D. Make any recommendations to the City Manager which it may consider desirable concerning conditions of employment and the administration of personnel in the City service;

E. Recommend to the City Council the amendment or repeal of the provisions of Sections 2.32.010 through 2.32.160;

F. Perform such other duties as may be necessary or appropriate for effective personnel administration consistent with the provisions of this Chapter and the City Charter. (Ord. 6847 § 2, 2006; Ord. 6801 § 2, 2005; Ord. 6800 § 1, 2005; Ord. 6750 § 2, 2004; Ord. 6667 § 1, 2003; Ord. 5635 § 6, 1988; Prior code § 2.37)

Section 2.36.035 Criminal conduct--Ineligibility for employment.

No person convicted (including pleas of guilty and nolo contendere) of a felony or a misdemeanor involving moral turpitude shall be eligible for employment by any department of the City; provided, however, that the appointing authority may disregard such conviction if it is found and determined by such appointing authority that mitigating circumstances exist, such as, but not limited to, evidence of rehabilitation, length of time elapsed since such conviction, the age of such person at the time of conviction, or the fact that the classification applied for is unrelated to such conviction.

The City Manager, Assistant City Manager, Human Resources Director, Chief of Police, City Attorney, and each appointing authority of the City, and the designees of the aforementioned persons are authorized to have access to the "State Summary Criminal History Information" as provided for in Section 11105 of the Penal Code of the State when it is required to assist such individual to fulfill employment responsibilities set forth in this section. (Ord. 7182 § 6, 2012; Ord. 6064 § 3, 1993; Ord. 4350 § 1, 1976)

Section 2.36.040 Classified service.

Section 2.36.040

Classified service. The classified service of the City shall include all regular full-time and regular part-time officers and employees, except the following:

A. Elective officers;

B. Persons appointed by the City Council, including City Manager, City Clerk and City Attorney;

C. Persons appointed by the City Manager, including department heads;

D. Persons appointed by the Mayor;

E. Persons appointed by the Chief of Police to position of Assistant Chief of Police and Deputy Chief of Police;

F. Persons appointed by the City Attorney and by the City Clerk.

G. Persons appointed by the Fire Chief to the position of Deputy Fire Chief. (Ord. 7229 § 5, 2013; Ord. 7140 § 1, 2011; Ord. 6560 § 1, 2001; Ord. 6141 § 1, 1994; Ord. 4065 § 1, 1973; Ord. 3477 § 1, 1967; prior code § 2.38)

RIVERSIDE MUNICIPAL CODE

RIVERSIDE, CALIFORNIA

Section 2.36.050 Appointments and promotions.

All appointments and promotions in the classified service shall be based on merit except those necessary to place City employees who are scheduled for layoff or who are scheduled for placement into another classification as a result of physical inability to perform the employee's current job as a result of industrial injury. Insofar as practical, eligibility for employment and advancement shall be determined by competitive examination. Appointments and promotions shall be made by the department head with the approval of the City Manager. All persons appointed to employment with the City shall be citizens of the United States or, except for public safety members, shall have obtained a permanent visa, and shall be of good character and qualified to perform the duties of the positions to which they are appointed. The Human Resources Director shall conduct such examinations and investigations as may be necessary to carry out the provisions of this section. (Ord. 6064 § 4, 1993; Ord. 4695 § 1, 1979; prior code § 2.39)

Section 2.36.060 Probationary periods.

All original and promotional appointments to the classified service shall be subject to a probationary period of six full calendar months except as follows: Original and promotional appointments to the classification of firefighter and police cadet shall be subject to a probationary period of twelve full calendar months; original and promotional appointments in the general unit, management unit and refuse unit made on or after September 20, 1979, shall be subject to a probationary period of twelve full calendar months; and original and promotional appointments to the classification of police officer shall be subject to a probationary period of eighteen full calendar months. An employee's probationary period may be extended or reinstated, if necessary, not to exceed six months.

The original and promotional probationary periods shall be regarded as part of the selection procedure and shall be utilized for the purpose of determining the person's performance and fitness for employment in the classified service. The reinstated probationary period shall be regarded as a notification period of substandard performance, but shall not deprive the employee of the rights and benefits of the classified service. (Ord. 4694 § 1, 1979; Ord. 4576 § 1, 1978; prior code § 2.40)

Section 2.36.070 Tenure--Employees service rating system--Outside employment or business activity.

The tenure of every person in the classified service shall be subject to satisfactory performance. An employee service rating system shall be established to carry out the provisions of this section. Any employee who engages in outside employment or business activity shall secure the approval of such employee's department head and the City Manager. No employee shall engage in such activity which adversely affects or reflects upon said employee's employment with the City. (Ord. 7229 § 5, 2013; Ord. 5358 § 1, 1985; Ord. 4622 § 1, 1978; prior code § 2.41)

Section 2.36.080 Suspension, demotion and dismissal.

Any employee may be suspended, demoted or dismissed for cause by his department head with the approval of the City Manager. Any person in the classified service who is so affected shall be entitled to written notice of such action and the reason therefor. (Prior code § 2.42)

Section 2.36.090 Appeals and hearings.

Any person in the classified service who deems himself aggrieved by any act or

RIVERSIDE MUNICIPAL CODE

RIVERSIDE, CALIFORNIA

omission by his department head may request a hearing before the Human Resources Board. After such hearing and investigation as it may deem necessary, the Human Resources Board shall make its findings and recommendations to the City Manager. The action of the City Manager on the recommendation of the Human Resources Board shall be final and conclusive. (Ord. 7229 § 5, 2013; Prior code § 2.43)

Section 2.36.100 Political activities.

A. No officer or employee of the City shall engage in political activity during working hours.

B. No person shall conduct political activities on the premises of the City. (Ord. 6393 § 8, 1997; Prior code § 2.44)

Section 2.36.110 Discrimination.

No person in City employment or seeking admission thereto shall be favored or discriminated against because of political opinion or affiliation or because of race or religious belief. (Ord. 7229 § 5, 2013; Prior code § 2.45)

Section 2.36.120 Cooperation.

All officers and employees of the City shall maintain high standards of cooperation and efficiency in such manner as to fulfill the objectives and purposes of the personnel merit system. (Prior code § 2.46)

Section 2.36.130 Appropriation of funds--Contracts for special services.

The City Council shall appropriate such funds as may be necessary to carry out the provisions of this chapter. The City Council, upon the recommendation of the City Manager, may contract with any responsible firm or individual for the performance of technical personnel services to carry out the provisions of this chapter. (Prior code § 2.47)

Attachment D

**MEMORANDUM OF UNDERSTANDING BETWEEN
THE REPRESENTATIVES OF MANAGEMENT FOR
THE CITY OF RIVERSIDE
AND
RIVERSIDE POLICE ADMINISTRATORS' ASSOCIATION**

PREAMBLE

The purpose of this document is to set forth the full terms and conditions of employment for the Police Administrators' Association Unit for the term March 14, 2014 through March 14, 2016 or through any agreed upon extension. The City may re-open the Memorandum of Understanding in the year 2014 to meet and confer regarding retirement benefits. This consolidated Memorandum of Understanding is entered into with reference to the following facts:

Representatives of Management for the City of Riverside (hereafter "City") and representatives of the Riverside Police Administrators' Association (hereafter "Association" or "RPAA") have met on a number of occasions and have conferred in good faith exchanging proposals concerning wages, hours, fringe benefits and other terms and conditions of employment for Lieutenants and Captains in the Police Administrators' Unit represented by the Association.

ARTICLE 1: RECOGNITION CLAUSE

Pursuant to the provisions of the Meyers-Milias-Brown Act, Government Code Section 3500, et seq., the City of Riverside recognizes the Riverside Police Administrators' Association as the bargaining representative of the employees in certain sworn management ranks employed by the Riverside Police Department hereinafter the 'Association' as follows:

Administrators Unit Included: The classifications of Police Lieutenant and Police Captain including those assigned to the rank of Deputy Chief.

Excluded: All other sworn safety ranks, all civilian employees, executive, confidential employees, part-time employees and those at-will on contract.

Department.

ARTICLE 11: TRANSFERS WITHIN THE DEPARTMENT

All assignments for employees represented by the Association are determined by the Chief.

ARTICLE 12: PROMOTIONAL PROCESS

Section 12.1 Subject to change these conditions guide the application process for filling a position opening for Captain:

12.1.1 All applicants must have completed probation,

12.1.2 Possess a Baccalaureate or higher degree from an accredited college or university at the time of application,

12.1.3 Submit an application with a brief resume attached (Applicants remain on the eligible list for two (2) years from the date of closing),

12.1.4 Submit to an examination by an inside oral board consisting of two (2) sworn command staff members of the rank of deputy chief or above. The oral board will review each applicant's Personnel File and resume and later discuss all candidates' qualifications with the Chief of Police.

12.1.5 The Chief of Police will individually interview as many applicants as deemed necessary to select for the vacant or created position(s).

12.1.6 Lieutenants who are not eligible to promote at the time of the announcement, but become eligible within six (6) months of the expiration of the current Captain promotional list, may submit an application and resume for inclusion on the list. However, prior to filling vacant or created positions, the applicant must also be subject to the same interview and review process. Those newly eligible Lieutenants will expire from the two year list at the same time the original list expires and they must reapply as outlined above.

Section 12.2 **RECLASSIFICATION POLICY**

The City reclassification policy will provide for Unit members that



PROOF OF SERVICE

I am employed in the County of Sacramento, State of California. I am over the age of 18 and not a party to the within action; my business address is: California Public Employees' Retirement System, Lincoln Plaza North, 400 "Q" Street, Sacramento, CA 95811 (P.O. Box 942707, Sacramento, CA 94229-2707).

On September 14, 2015, I served the foregoing document described as:

CalPERS' CLOSING BRIEF- In the Matter of the Calculation of Final Compensation of TIMOTHY BACON, Respondent, and DARRYL HURT, Respondent, and CITY OF RIVERSIDE, Respondent. ; Case No. 2012-0191; OAH No. 2014090781.

on interested parties in this action by placing ___ the original XX a true copy thereof enclosed in sealed envelopes addressed and/or e-filed as follows:

Joseph Bolander
Gaspard Castillo Winter Harper, APC
3333 Concourse Street, Bldg. 4, Suite 4100
Ontario, CA 91764
(Via Overnight Mail)

Office of Administrative Hearings
San Diego
1350 Front Street, Suite 3005
San Diego, CA 92101
(Via e-file:sanfilings@dgs.ca.gov)

Neil Okazaki
City of Riverside
3900 Main Street
Riverside, CA 92522
(Via Overnight Mail and Via Email:
nokazaki@riversideca.gov)

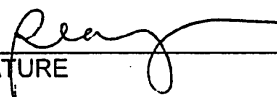
- [XX] BY FEDEX OVERNIGHT MAIL -- As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Sacramento, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing an affidavit.
- [XX] BY ELECTRONIC TRANSMISSION: I caused such document(s) to be sent to the addressee(es) at the electronic notification address(es) above. I did not receive within a reasonable time of transmission, any electronic message, or other indication that the transmission was unsuccessful.

Executed on September 14, 2015, at Sacramento, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Adriana Reagin

NAME



SIGNATURE

08/27/2015 09:19 9518200752

LEGAL

PAGE 01



CITY OF RIVERSIDE

OFFICE OF THE CITY ATTORNEY
3900 Main Street, Riverside, California 92522
951.826.5567 - FAX: 951.826.5540



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People

FAX TRANSMITTAL SHEET

URGENT REQUEST

DATE: 8/27/15

TO: Mary Agnes Matyszewski, Administrative Law Judge
OF: Office of Administrative Hearings
FAX NO: 916-376-6325

TO: Preet Kaur, Staff Attorney
OF: CALPERS
FAX NO: 916-795-3659

TO: Joseph Bolander, Esq.
OF: Gaspard Castillo Winter Harper, APC
FAX NO: 909-466-5610

FROM: Neil Okazaki, Deputy City Attorney

SUBJECT: Timothy Bacon v. City of Riverside
Darryl Hurt v. City of Riverside

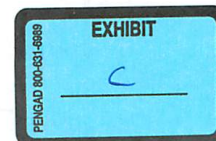
MESSAGE: Please see attached Waiver of Closing Argument

NUMBER OF PAGES (Including transmittal page): 4

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 12 municipal corporation

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BEFORE THE
 BOARD OF ADMINISTRATION
 CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
 STATE OF CALIFORNIA

In the Matter of the Calculation of Final Compensation of:) Case No. 2012 0191
 TIMOTHY BACON) OAH No: 2014090781
 Respondent,)
 v.)
 CITY OF RIVERSIDE,)
 Respondent.)

Case No. 2012 0190
 OAH No: 2014090777
 WAIVER OF CLOSING ARGUMENT

In the Matter of the Calculation of Final Compensation of:)
 DARRYL HURT)
 Respondent,)
 v.)
 CITY OF RIVERSIDE,)
 Respondent.)

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The City of Riverside has elected not to prepare a closing argument in this matter.

DATED: August 27, 2015

GARY G. GUESS, City Attorney
ROBERT L. HANSEN, Supv. Deputy City Attorney
NEIL OKAZAKI, Deputy City Attorney

By: *Neil Okazaki* for
Neil Okazaki
Attorneys for Respondent
CITY OF RIVERSIDE



PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF RIVERSIDE

I am a resident of the county aforesaid; I am over the age of 18 years and not a party to the within above-entitled action; my business address is 3900 Main Street, Riverside, California 92522.

On August 27, 2015, I served the within: **WAIVER OF CLOSING ARGUMENT** on the interested parties in said action addressed as follows:

Preet Kaur Staff Attorney CALPERS P. O. Box 94707 Sacramento, CA 94229-2707 FAX: (916) 795-3659	Joseph Bolander, Esq. Gaspard Castillo Winter Harper, APC 3333 Concourse Street, Blvd. 4, Suite 4100 Ontario, CA 91764 FAX: (909) 466-5610 Attorneys for Timothy Bacon and Darryl Hurt
Mary Agnes Matyszewski Administrative Law Judge Office of Administrative Hearings 1350 Front Street, Suite 3005 San Diego, CA 92101 FAX: (916) 376-6325	

(XX) **VIA MAIL** - In accordance with the regular mail collection and processing practices of this business office, with which I am familiar, by means of which mail is deposited with the United States Postal Service at Riverside, California, that same day in the ordinary course of business, I deposited such sealed envelope for collection and mailing on this same date following ordinary business practices pursuant to C.C.P. § 1013(a).

() **PERSONAL** - I caused such envelope to be delivered by hand to the above-listed addressee pursuant to C.C.P. § 1011.

() **VIA OVERNIGHT DELIVERY** - I caused such envelope to be delivered by hand to the office of the addressee via overnight delivery pursuant to C.C.P. § 1013(c). Said document was deposited at the box regularly maintained by said express service carrier on the date set forth above.

(XX) **VIA FACSIMILE** - I caused such document to be delivered to the office of the addressee via facsimile machine pursuant to C.C.P. § 1013(e). Said document was transmitted from the office of City Attorney in Riverside, California, on the date set forth above.

I declare under penalty of perjury, under the laws of the State of California that the foregoing is true and correct.

Executed on August 27, 2015, at Riverside, California.

Adrienne A. Kearns

Filed OAH
By: Adriaen Date: 03/26/15 4:35

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9 TIMOTHY BACON and DARRYL HURT

10 **BEFORE THE BOARD OF ADMINISTRATION**
11 **CALIFORNIA PUBLIC EMPLOYEEST RETIREMENT SYSTEM**
12 **STATE OF CALIFORNIA**

13 In the Matter of the Appeal of Final
14 Compensation:

15 DARRYL HURT,
16 AND
17 CITY OF RIVERSIDE

18 Respondents.

Agency Case No. 2012 0190

OAH No. 2014090777

19 In the Matter of the Appeal of Final
20 Compensation:

21 TIMOTHY BACON,
22 AND
23 CITY OF RIVERSIDE

24 Respondents.

Agency Case Nos. 2012 0191

OAH No. 2014090781

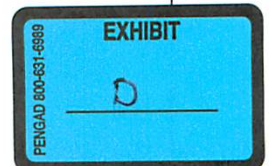
**RESPONDENT'S REPLY TO CALPERS
CLOSING ARGUMENT BRIEF**

25 **RESPONDENT'S REPLY TO CALPERS ARGUMENTS**

26 ///

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28 **RESPONDENT'S REPLY TO CALPERS CLOSING ARGUMENT BRIEF**



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I. ARGUMENT

A. The Top-Step Captains Back-Pay and Prospective Compensation as Top-Stop Captains Were Available to All Similarly Situated Police Captains, a Group of Which Respondents Were Members

It is true that Hurt and Bacon’s pay-rate under the PERL is determined by looking at the normal pay of similarly situated members of the group or class of employment. (§20636(b); *Prentice*, 157 Cal.App.4th at 990). In *Prentice*, the court relied on communications between the city and CalPERS to determine of which class or group *Prentice* was a member. (*Id.* at 992). These communications made it clear to the court that *Prentice* was a member of the Management Confidential group. (*Id.*). *Prentice* later argued that in addition to being a member of the Management Confidential group, he was also “a member of a group made up of himself.” (*Id.* at 993). The Court rejected this argument.

But unlike in *Prentice*, the settlement agreement and pay records make it clear that both Hurt and Bacon were promoted to captain and were compensated accordingly. (Exhibit 7; Exhibit 8). Therefore, Respondents were similarly situated with top-step Captains at the Department, and they were paid in accordance with the publicly available pay schedule for top-step Captain. They were not a part of some other class of two, comprised only of themselves. Moreover, merely because some documents suggest that Respondents remained lieutenants in name and name only, does not change the nature of the agreement between Respondents and the City, nor the substantive reality that they acted as and were paid as Captains.

CalPERS argument that neither Hurt nor Bacon were promoted via the City’s merit based process is also misplaced. Respondents do not contend that they were promoted via the merit system, but that should not end the analysis. Specifically, one of the primary issues behind Hurt and Bacon’s lawsuit against the City was the fact that both had been denied a merit-based promotion because of their involvement in political activities that are protected by the First Amendment. (RT Hearing 18:14-17; RT Hearing 71:14-19).

CalPERS Retirement Program Specialist, Samuel Camacho testified at the hearing that there is no Government Code requirement as to how an agency is required to grant promotions.

1 (RT Hearing 147:12-16). Moreover, CalPERS does not “get into telling the agency how to
2 promote their employee...” (RT Hearing 148:14-16). Thus, even if a promotion does not strictly
3 adhere to City guidelines, CalPERS should be bound by the City’s determination of an
4 employee’s classification. Especially in a situation like the case at hand, wherein the
5 Respondents received months of pay at a top-step captain classification, the exact position to
6 which the City agreed to promote them.

7 Additionally, while it is true that the City’s Municipal Code requires that promotions be
8 based on merit, just a few sections down the same Code states that “[n]o person in City
9 employment...shall be favored or discriminated against because of political opinion or
10 affiliation...” (CalPERS Attachment B, City of Riverside Municipal Code, Chapter 2.36, section
11 2.36.110). Thus, where employees are passed over for promotion because of their involvement in
12 protected activities, they should not be further denied the benefits of that promotion merely
13 because they had to go to federal court to obtain the promotion.

14 **B. While Respondent’s Promotions Were Pursuant to A Negotiated Settlement**
15 **Agreement, Both Were Paid Pursuant to the Publicly Available Pay Schedule**
16 **for the Position to Which They Were Promoted**

17 As argued above, CalPERS’ contentions that merely because Respondents had to sue the
18 City in order to get promoted should not end the discussion. Certainly, if Respondents had taken
19 the case to trial and won, and the Court ordered Respondents to be promoted, CalPERS would
20 not argue now that they should be denied Captain’s promotions. Again, “how” won achieves a
21 promotion should not be dispositive.

22 Furthermore, once the OAH recognizes the fact that Respondents were merely asserting
23 their rights to prevent the City from illegal retaliation, it must then look at Respondent’s pay
24 records to see that both were being compensated according to the publicly available pay schedule
25 for a police captain. (Exhibit 8).

26 CalPERS also relies on the court’s decision in *Molina* to demonstrate that, as in *Molina*,
27 because Respondent’s increase in salary were due to a settlement agreement, that it cannot be
28 considered payrate. (CalPERS Closing Brief, p. 16). In *Molina*, however, the pensioner was

1 trying to classify the lump sum monies paid pursuant to the settlement agreement as his payrate
2 and thus the basis for his retirement calculation. (200 Cal.App.4th at 66). Unlike *Molina*,
3 respondents are not claiming any non-economic damages received as compensation earnable.
4 Instead, Respondents were paid commensurate with similarly situated top-step captains for a
5 period of months and it is that money which they are entitled to have considered in their
6 retirement calculations. (Exhibit 8).

7 The court in *Prentice* did hold that “[a] written employment agreement with an individual
8 employee is not a labor policy or agreement within the meaning of the regulation.” (*Prentice*,
9 157 Cal.App.4th at 995; emphasis not included). But unlike *Prentice*, however, where the
10 pensioner was placed outside of a recognized group, respondents were placed in a classification
11 that included all other top-step police captains. (*Id.* at 993; Exhibit 7).

12 CalPERS argues that because the settlement agreement was to remain confidential it does
13 not “conform with any of the criteria necessary for it to be considered a publicly available pay
14 schedule...or as discussed in *Adams*.” (CalPERS Closing Brief, p. 17). Most importantly, there is
15 no requirement that a member’s payrate be publicly available. The members simply must be
16 paid according to a publicly available pay schedule for the position—here, top-step Captain.
17 Additionally, while the terms of the settlement agreement were supposed to be confidential, no
18 confidentiality agreement was ever reached. (RT Hearing 92:5-8). Respondent Bacon also
19 testified that it was no secret that they had been promoted to captain. In fact, Bacon stated that
20 current police officers, including other captains, address him as captain. (RT Hearing 76:25-
21 77:2).

22 **C. Respondent’s Back-Pay Portion of Their Settlement Represented B-Weekly**
23 **Pay at the Top-step Captain Salary**

24 In *Molina*, the pensioner received a one-time payment of \$200,000 and asked that it be
25 considered compensation earnable for his final year of employment. (200 Cal.App.4th at 58). The
26 court held that “even if the \$200,000 figure (now settled upon by *Molina*) was deemed ‘back
27 pay,’ this would not necessarily increase his pension because the payrate for the position he had
28

1 held with Oxnard was \$8,527.98 per month and it was not affected by the settlement payout.”
2 (*Id.* at 66).

3 Unlike *Molina*, however, Respondents received top-step captains pay prospectively from
4 the date of the settlement and backpay for months of missed top-step Captain pay (which was the
5 same amount as similarly situated employees) AND were paid in accordance with the publicly
6 available pay schedule for police captains. (Exhibit 7; Exhibit 8). Furthermore, a CalPERS
7 witness in *Molina* testified that if the pensioner had been “reinstated into a [] position with the
8 City of Oxnard whose publicly available pay scale is \$200,000. And he would have had to have
9 worked in that position for 12 months. And that would entitle him to a re-retirement with the
10 final compensation of \$200,000.” (*Molina*, 200 Cal.App.4th at 66).

11 Unlike *Molina*, where the pensioner was reinstated for one day, the settlement agreement
12 between the City and Respondents was reached on April 12, 2010. (Exhibit 7). Respondent Hurt
13 retired from service on January 19, 2011, and Respondent Bacon retired on July 17, 2010. *Id.*
14 This shows that both were in place as captains for an extended period of time. Moreover, as
15 argued in the Respondent’s Closing Argument Brief, CalPERS never informed Respondents of
16 this alleged timing requirement and never even gave them the opportunity to adjust their
17 retirement dates accordingly. Thus, as argued throughout the Respondent’s Closing Argument
18 Brief, Respondents should not be denied retirement benefits because of CalPERS providing
19 inaccurate information.

20 **D. Equitable Estoppel is Available for Respondents Under the PERL**

21 Hurt and Bacon do not ask for a benefit otherwise unavailable under the express
22 provisions of the PERL, as CalPERS claims. (see CalPERS Closing Brief, p. 21; citation
23 omitted). As Senator Roth testified, he was present at a conference call that took place in or
24 around April of 2010, at which City staff spoke with a representative of CalPERS. (RT Hearing
25 87:18-88:12). The purpose of this call was to outline the proposed settlement agreement to
26 CalPERS and ensure that there would be no issues with its terms. (RT Hearing 88:21-23). The
27 representative of CalPERS indicated that the terms would be acceptable and that both Hurt and
28 Bacon would receive retirement benefits at a top-stop captain payrate. (RT Hearing 90:1-9).

1 CalPERS argues that Senator Roth's testimony was "vague and ambiguous." (CalPERS
2 Closing Brief, p. 21). While it is true Senator Roth could not recall the precise wording of the
3 phone call that occurred several years ago, he made it clear that the call was intended to offer
4 assurances that the terms of the settlement agreement between the City and Respondents would
5 factor into the Respondent's retirement calculations. (RT Hearing 88:21-23). CalPERS also
6 contends that it was "unreasonable" for Respondents attorney at the time to "rely on what he
7 heard through the grape vine." (CalPERS Closing Brief, p. 22). That is hardly an accurate way
8 to describe the communications that occurred. The City's attorney, Senator Roth, told
9 Respondents attorney, Mr. Perry, about the City's communication with CalPERS and that the
10 agreement would allow Respondents to receive retirement benefits as top-step captains. (RT
11 Hearing 90:1-9). The OAH should not consider communications between the attorneys who
12 represent the parties as "the grape vine." If Senator Roth is to be believed, and CalPERS offers
13 no reason to doubt his testimony, it is clear that CalPERS was appraised of the facts and that
14 Respondents relied on CalPERS' assurances.

15 **E. Respondents Were Compensated as Top-Step Captains and are Entitled to**
16 **Receive Retirement Benefits as Top-Step Captains**

17 CalPERS wrongly argues that the Respondent's pay increase falls outside of what is
18 available under the PERL. (CalPERS Closing Brief, p. 21-22). In *City of Pleasanton v. Board of*
19 *Administration*, the court held that it was not authorized to compel CalPERS to "pay greater
20 benefits that section 20636 allows..." ((2012) 211 Cal.App.4th 522, 544). Here, however,
21 Respondents are not seeking any retirement benefit that is not allowed under the statute.
22 Respondents contend that they were promoted to captain, received salaries as top-step captains
23 and ultimately retired from the department as top-step captains. Thus, it is well within CalPERS
24 authority to recognize that Respondents received salaries commensurate with similarly situated
25 top-step captains and are entitled to receive retirement benefits as such.

26 The contention that a ruling in favor of Respondents would "conflict with strong public
27 interest" is misguided. (CalPERS Closing Brief, p. 23). Specifically, the public has a strong
28 public interest in ensuring that cities do not take advantage of their employees and do not

1 discriminate against employees when they try to engage in constitutionally protected activities.
2 The public also has a strong interest in ensuring that members can rely on material
3 representations from CalPERS, and that CalPERS cannot simply walk away from those life
4 altering representations whenever it sees fit.

5 **F. Respondents Were Promoted to Captain and Remained in that Position for**
6 **Several Months, But Could Not Continue to Work With Members of Upper-**
7 **Management Whom They had Just Sued**

8 Contrary to CalPERS arguments, Respondent's increased compensation should not be
9 considered "final settlement pay" because they did not receive the increase "in connection" with
10 their retirement. As discussed throughout the Respondent's Closing Argument Brief,
11 Respondents were veteran lieutenants and were well qualified for the position of captain. (RT
12 Hearing 15:13-15; RT Hearing 69:8-10). Both were denied promotions until they sued the City;
13 one of the remedies sought was a promotion to captain. (RT Hearing 56:12-15).

14 There is no question that it would have been difficult, if not impossible, for either to
15 perform typical management duties after having accused the City and its upper-management
16 employees of engaging in unlawful practices. Additionally, the wording of the settlement
17 agreement is clear, Respondents were to effectively remain as police captains until they were
18 each eligible for retirement. (Exhibit 7). Merely because the terms of their retirements are
19 mentioned in the settlement agreement does not make their promotions and increased salaries "in
20 connection" with their retirement.

21 **II. CONCLUSION**

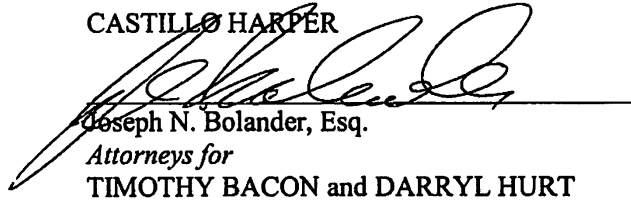
22 The City discriminated against Respondents for their engaging in constitutionally
23 protected activities. This discrimination took the form of failing to promote two veteran officers
24 to a position for which they were extremely well qualified. Respondents asserted their rights and
25 the City promoted them to captains and compensated them accordingly. CalPERS should be
26 required to recognize these promotions and the top-step captain's compensation received by
27 Respondents and include this compensation in their retirement benefit calculations. This does not
28 require a re-writing of the PERL, merely a recognition that Respondents have earned these

1 benefits and are thus entitled to receive that which they have earned over decades of public
2 service.

3
4 Dated: September 28, 2015

Respectfully submitted,

5
6 CASTILLO HARPER

7 
8 Joseph N. Bolander, Esq.
9 *Attorneys for*
10 TIMOTHY BACON and DARRYL HURT

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PROOF OF SERVICE

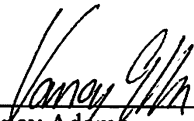
I declare that I am over the age of eighteen (18) and not a party to this action. My business address is 3333 Concourses St., Bldg. 4, Ste. 4100, Ontario, CA 91764.

On September 28, 2015, I served the following document described as **RESPONDENT'S REPLY TO CALPERS CLOSING ARGUMENT BRIEF** on the interested parties in this action by placing a true and correct copy of each document thereof, enclosed in a sealed envelope addressed as follows:

Office of Administrative Hearings <i>Attn: Administrative Law Judge,</i> <i>Mary Agnes Matyszewski</i> Sanfilings@dgs.ca.gov Via EMAIL ONLY	CalPERS <i>Attn: Preet Kaur, Staff Attorney</i> P.O. Box 94707 Sacramento, CA 9422-2707 preet.kaur@calpers.ca.gov VIA US MAIL AND EMAIL
City of Riverside <i>Attn: Neil Okazaki</i> 3900 Main Street Riverside, CA 92522 nokazaki@riversideca.gov VIA US MAIL AND EMAIL	

- I am readily familiar with the business practice for collection and processing of correspondence for mailing with the United States Postal Service. I know that the correspondence was deposited with the United States Postal Service on the same day this declaration was executed in the ordinary course of business. I know that the envelope was sealed and, with postage thereon fully prepaid, placed for collection and mailing on this date in the United States mail at Ontario, California.
- By Personal Service, I caused such envelope to be delivered by hand to the above addressee(s).
- By facsimile machine, I caused the above-referenced document(s) to be transmitted to the above-named persons(s)
- By Overnight Courier, I caused the above referenced document(s) to be delivered to an overnight courier (UPS) for delivery to the above addressee(s).
- BY ELECTRONIC MAIL (E-MAIL) I served the foregoing document by electronic mail (e-mail): nokazaki@riversideca.gov; preet.kaur@calpers.ca.gov; Sanfilings@dgs.ca.gov
- (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on September 28, 2015, at Ontario, California.


Nancy Adams

PROOF OF SERVICE

Filed OAH
By: kds/edw Date: 05/28/15 4:36

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5 Attorneys for California Public
Employees' Retirement System

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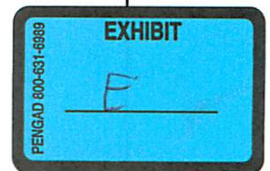
8 BOARD OF ADMINISTRATION

9

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

10

11 In the Matter of the Application for Final Compensation	)	CASE NO. 2012-0191
	)	OAH NO. 2014090781
12 TIMOTHY BACON & DARRYL HURT,	)	CalPERS' REPLY BRIEF
)	
13 Respondents,)	
)	
14 and)	
)	
15 CITY OF RIVERSIDE,)	
)	
16 Respondent.)	



17 This is a case where two Lieutenants received increased compensation
18 pursuant to a settlement agreement which not only was in anticipation of separation,
19 but required it. Respondents were never promoted to the rank of Captain and never
20 worked a day performing the duties of a Captain yet seek to base their final
21 compensation, and thereby their lifetime pensions on the payrate of a Captain.
22 Despite Respondents' attempt to argue otherwise, this case is analogous to the
23 circumstances addressed by the courts of appeal in *Monila v. Bd. Of Administration*
24 (2011) 200 Cal. App. 4th 53, *Prentice v. Board of Administration* (2007)157 Cal. App.

25

1 4th 983, and *Snow v. Bd. of Admin.* (1978) 87 Cal. App. 3d 484), where, in each case,
2 the courts refused to permit the calculation of a public pension based on an increase in
3 compensation supported only by a settlement agreement.

4 **A. RESPONDENT'S FINAL COMPENSATION CANNOT BE BASED ON THE TOP-
5 STEP CAPTAIN'S PAYRATE.**

6 Even though they may have received back pay at the rate appropriate for the
7 rank of Captain beginning January 2008, Respondents concede they worked only in
8 the rank of Lieutenant until April 2010. (Respondents' Exh. 7, p. 2:15-21;
9 Respondent's Closing Argument (RAC) pp. 5:14-16 "... Respondents continued to
10 work as police lieutenants as the lawsuit between Respondents and the City was
11 litigated. . ."; 8:13-15; 9:6-9,15-17; 13:13-18.) There is a complete the lack of evidence
12 otherwise, and it is undisputed that Respondents' served as Lieutenants until April
13 2010. The only remaining dispute is whether they were promoted to Captains or
14 remained Lieutenants from April 2010 until retirement.

15 **1. Respondents argue they were promoted to the rank of Captain beginning
16 April 2010 and until their retirement but proffer no evidence supporting
17 such an assertion.**

18 Neither compensation received pursuant to a lawsuit, nor even mere
19 performance of duties of a higher rank is sufficient to justify the use of the payrate of a
20 higher classification. (*Snow*, 87 Cal. App. 3d at 489; *Monila*, 200 Cal. App. 4th at 66,
21 *Ligon v. State Personnel Bd.* (1981) 123 Cal. App. 3d 583, 589-590.) Furthermore,
22 mere compensation matching the payrate of a higher classification does not entitle an
23 employee to the higher classification. (*Snow*, 87 Cal. App. 3d at 489.)

24 Here, Respondents fail to offer any evidence demonstrating they were
25 promoted from Lieutenants to Captains. Respondents repeatedly reference
Respondent's Exhibit 7, the Settlement agreement, to support their argument that they

1 were promoted to Captains. (RAC pp. 2:12-14, 5:14-16, 8:13-15; 9:6-7.) Respondents,
2 however, fail to point the Court to the particular section, paragraph or line where the
3 Settlement provides for such a promotion. Rather, the Settlement clearly states that
4 "Hurt will retire from the City of Riverside Police Department as a Police Lieutenant . . .
5 and Bacon will retire as a Police Lieutenant. (Respondent's Exhibit 7, p.2:7-10.)

6 Nowhere in the Settlement agreement does the City even admit fault or take
7 responsibility for failing to promote. (Respondents Exhibit 7.) The Settlement states
8 nothing about promotion from Lieutenants to Captains. The only issue the Settlement
9 touches upon is back pay from January 2008 to the date of the Settlement and an
10 increase in pay from the date of Settlement until retirement. It is unclear how
11 Respondents conclude that receiving back pay from 2008 to the date of Settlement,
12 based on a Captain's rate, did not promote them to Captains but receiving increase in
13 pay from date of settlement to retirement, based on Captain's rate, somehow promoted
14 them to Captains. Thus, on its face, the Settlement does not promote Hurt and Bacon.
15 Hurt and Bacon remained Lieutenants until retirement. This is evidenced by not only
16 the Settlement agreement but also by the City's representations to CalPERS and by
17 the representations of Hurt and Bacon to CalPERS. (Exhs. 9, 10, 16, 17, & 18.)

18 Hurt and Bacon testified that they believed they were being promoted to the
19 position of a Captain, however, as in *Prentice*, such self-serving statements are not
20 sufficient basis for a promotion. (*Prentice*, 157 Cal. App. 4th at p. 993.) One's belief
21 that they are the CEO of an agency does not entitle them to the higher classification,
22 even if they receive back pay as a CEO or perform the duties of a CEO. *Snow*
23 requires more. *Snow* requires the promotion must be pursuant to the applicable rules
24 of civil service (*Snow*, 87 Cal. App 3d at 489-90.) Hurt and Bacon were not promoted
25 through the merit based rules as required by the City Charter and the Memorandum of

1 Understanding. (Attachment A & B to CalPERS Closing Brief; Transcript 52:1-2;
2 114:22-25; 115:1-14.) Pursuant to *Snow*, any promotion not provided in accordance
3 with the civil service rules cannot be a basis for calculating pension benefits.

4 Although performance of duties of a Captain would not entitle them to a higher
5 classification, it is also important to note that Hurt and Bacon never performed the
6 duties of a Captain. (See *Snow*, 87 Cal. App. 3d at 489.) Respondents are unable to
7 bolster their argument by demonstrating they performed any services other than those
8 already performed by them as Lieutenants. (RAC pp. 3:1-3, 5:19-27, 6:1-2, 9:1-3 "... it
9 is clear that it would have been difficult for either to perform management duties after
10 having accused the City. . .")

11 Hurt and Bacon were not promoted pursuant to the civil service rules and never
12 performed the duties of Captain. Furthermore, contrary to Respondents' contention,
13 they were not promoted pursuant the Settlement agreement either. The Settlement
14 merely provides back pay and an adjustment in pay from 2008 until retirement.

15 **2. Respondents Payrate is that of a Lieutenant until April 2010.**

16 Even if it is accepted that Respondents were promoted to the rank of Captain
17 beginning April 2010 to retirement, their promotion of three or seven months does not
18 entitle them to a final compensation based exclusively on the top-step payrate of a
19 Captain. If Respondents' contentions are accepted as true, that they were Lieutenants
20 until April 2010, and were promoted by the Settlement agreement to the rank of
21 Captain from April 2010 until their retirement dates, the PERL requires that the payrate
22 of a Lieutenant must be applied until April 2010 and the payrate of Captain can be
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24
25

1 applied after April 2010 to determine their final compensation. (See Gov. Code.,
2 §20037).¹

3 "Final Compensation" is an employee's highest "average" annual "compensation
4 earnable" by a member during the twelve or thirty-six months of employment
5 immediately preceding the effective date of his retirement (§§20037, 20042.) Here,
6 Hurt and Bacon's highest average annual compensation earnable is based on twelve
7 months of employment immediately preceding their separation. (Attachment 1.) Mere
8 remuneration cannot be the basis of compensation earnable. (*Oden v. Board of*
9 *Administration* (1994) 23 Cal. App. 4th 194, 198; citing former 20020 (currently 20630.)
10 "Compensation earnable" is based on an employee's payrate and if applicable "special
11 compensation" (Gov. Code §20636(a).) "Payrate" is (a) the normal monthly rate of
12 pay (b) paid in cash (c) to similarly situated members of the same group or class (d) for
13 services rendered on a full time basis (e) pursuant to a publicly available pay schedule.
14 (§20636; subd. (b); Cal Code Regs. , Title 2, §570.5.)

15 Here, Respondents essentially argue they belonged to two classifications during
16 their final 12 months of employment, Lieutenants until April 2010 and Captains after
17 April 2010. (RAC pp. 5:14-16; 8:13-15; 9:6-9,15-17; 13:13-18) Section 20037,
18 provides that final compensation is the "highest average" compensation earnable.
19 Thus, at the least, for Hurt, the payrate of a Lieutenant is applicable for nine months,
20 and for Bacon, the payrate of a Lieutenant is applicable for five months. Therefore, in
21 light of section 20037, it is unclear how Respondents conclude Hurt and Bacon's final
22 compensation must be based on the top-step Captain's payrate while conceding they
23 were only Captains for three to seven months. (RAC 5:14-16, 6:9-10, 8:13-15; 9:6-
24 9,15-17; 13:13-18.)

25 ¹ Statutory references, unless otherwise indicated, are to the Government Code.

1 **3. The increases in pay was “Final Settlement Pay” and cannot be**
2 **considered compensation earnable or used in Respondents’ final**
3 **compensation for the purpose of calculating their retirement allowance.**

4 Respondents attempt to limit *Monila* and section 20636(f) and argue the settlement
5 pay was not in connection with separation from employment. (RAC pp. 7:4-8, 8:23-28,
6 9.)

7 Respondents argue *Monila’s* holding, that “settlement proceeds cannot, as a matter
8 of law, be utilized to increase” final compensation for the purpose of calculating
9 pension benefits, should only be applied where the elements of compensation
10 earnable are not met. (*Monila*, 200 Cal. App. 4th at 67; RAC pp. 6:11-14, 7:4-8.)

11 Respondents, however, fail to cite any support or legal authority for their legal
12 proposition. Respondents ignore that Cal. Code of Regs., Title 2, section 570,
13 specifically contemplates that remuneration falling within the proscription of final
14 settlement pay may take the form of compensation earnable yet also requires that final
15 settlement pay must be “excluded from payroll reporting to PERS, in either payrate or
16 compensation earnable.” Contrary to Respondent’s argument, section 20636, Cal.
17 Code Regs. §570 and *Monila* specifically require settlement proceeds, regardless if
18 they otherwise meet the elements of compensation earnable, be excluded from
19 compensation earnable. By requesting the Court limit the holding in *Monila*,
20 Respondents request the court to rule in violation of the express provisions of section
21 20636, Cal. Code Regs. §570, and relevant case law.

22 Respondents also attempt to argue the increases in pay was not pursuant to an
23 Settlement agreement in anticipation of separation, however, the evidence clearly
24 states otherwise. (RAC pp. 8:23-28, 9.) Final settlement pay is compensation in
25 excess of compensation earnable granted to a member in “connection with or
26 anticipation of separation” from employment. (§20636, subd. (f); Cal. Code Regs, Title

1 2, §570.) Respondents argue that because they were placed on administrative leave
2 for three to seven months and did not separate from employment immediately after
3 entering the Settlement agreement, the settlement pay was not in anticipation of or in
4 connection with separation from employment. (RAC p. 9:6-12.)

5 Respondent's argument is flawed. Neither the statutory or regulatory definitions
6 require immediate separation from employment. The Settlement sets out the duties
7 and responsibilities of the City, which are to provide increase in compensation. Hurt
8 and Bacon are required to retire and the requirement is part of the Settlement and thus
9 in connection with the Settlement agreement. Hurt and Bacon's testimony, that they
10 retired in exchange of receiving the settlement payments, clearly demonstrates that the
11 receipt of the increased pay was in connection with the Settlement and thus final
12 settlement pay. (Transcript 43:14-10, 116:19-25, 117:1-13.)

13 Thus, as final settlement pay, the increase in pay cannot be included in
14 Respondents' compensation for use in calculating their retirement allowance.

15 **B. RESPONDENTS FAIL TO MEET THE BURDEN OF PROOF FOR THEIR**
16 **EQUITABLE ESTOPPEL CLAIM**

17 **1) The application of estoppel will require CalPERS to disregard the**
18 **express statutory provisions of the law**

19 Although they have no entitlement to the benefits, Respondents request the
20 Court apply equitable estoppel to give them the benefits they demand. The
21 government may be bound by equitable estoppel, but only if "justice and right require"
22 and application will not otherwise be "harmful to some specific public policy or public
23 interest or where it would enlarge the power of a government agency or expand the
24 authority of a government official." (*Crumpler v. Bd. of Admin.* (1973) 32 Cal. App. 3d
25 576, 570-571.) In *Longshore v. County of Ventura* (1979) 25 Cal. 3d 14, 28, the court

1 stated that "no court has expressly invoked principles of estoppel to contravene directly
2 any statutory or constitutional limitations."

3 More specifically, retirement benefits under CalPERS are entirely statutory, and
4 estoppel "cannot rewrite a statutory limitation on a benefit or privilege." (*Hudson v.*
5 *Posey* (1967) 255 Cal. App. 2d 89, 91; *Smith v. Governing Bd. of Elk Grove Unified*
6 *School Dist.* (2004) 120 Cal. App 4th 563, 569.) In *Duarte v. Cal. State Teachers'*
7 *Retirement System* (2014) 232 Cal. App. 4th 370, 385, the court reiterated that a
8 member cannot obtain pension benefits, he is otherwise not entitled to, on the basis of
9 estoppel:

10 The constitutional obligations of a public retirement board such as the
11 CalSTRS Board have been interpreted to include a duty "to `ensure the rights
12 of members and retirees to their full, *earned* benefits.'" (*City of Pleasanton*
13 *v. Board of Administration* (2012) 211 Cal. App. 4th 522, 544, 149 Cal. Rptr.
14 3d 729, italics added.) Such obligations therefore do not permit the payment
15 of benefits not otherwise authorized. (*Ibid.*) Rather, "the statutory scheme
16 governs the scope of the benefits earned." (*Chaidez v. Board of*
17 *Administration* (2014) 223 Cal. App. 4th 1425, 1430–1431, 169 Cal. Rptr. 3d
18 100.) Thus, while "[p]ension provisions should be broadly construed in
19 favor of those who were intended to be benefited thereby ... [,] they cannot
20 be construed so as to confer benefits on persons not entitled thereto.'" (*Id.*
21 at p. 1431, 169 Cal. Rptr. 3d 100.)

22 In this case Respondents attempt to invoke estoppel to obtain a pension benefit
23 in excess of the PERL and violate the public policy set forth and expressed in the
24 above cited sections of that statutory scheme. Application of estoppel in this instance
25 will require CalPERS to disregard express provisions of the PERL and manifestly
disrupt the administration of the system. Specifically, application of equitable estoppel
will require CalPERS to consider the pay increase as compensation earnable, in
violation of *Monila, Snow* and sections 20636(f) and 20037 and other legal authorities
previously discussed.

1 *Snow* requires a member must be promoted to a higher classification through
2 the rules of civil service to receive compensation based on the payrate of the higher
3 classification. Here, members were not promoted, if at all, through the rules of civil
4 service, thus application of estoppel will require the Court to completely ignore the
5 holding in *Snow*. The Court will also be required to overlook section 20636 and
6 consider the final settlement pay as compensation earnable, in violation of the statute.
7 To meet Respondents' demands and base their final compensation on their highest
8 pay within the last 12 months before their separation, rather than their highest
9 "average" compensation earnable within the last 12 months before separation, Court
10 will be required to rule in violation of section 20037.

11 To avoid litigation with the City over a settlement that Respondents haphazardly
12 entered and are now dissatisfied with, Respondents urge the Court to rewrite the
13 pension statutes and ignore relevant case law. Granting Respondents the requested
14 benefits would require the Court to contravene directly the statutory limitations set out
15 by the PERL. This cannot be done under the guise of equity.

16 **2) Equitable Estoppel is Unavailable Even if Reliance is Reasonable.**

17 Respondents' reliance is unreasonable, however, where the application of
18 equitable estoppel will require CalPERS to violate the express provisions of the law,
19 equitable estoppel cannot be applied even if reliance was reasonable. (*City of Long*
20 *Beach v Mansell* (1970) 3 cal. 3d 462, 493-494; citing *County of San Diego v. Cal.*
21 *Water & etc. Co.* (1947) 30 Cal. 2d 817, 829-830.) Even if there is an express
22 contract, estoppel cannot apply where an indirect enforcement of the provision by
23 estoppel would conflict with the specific statutory requirement. (*Id.*)

24 ///

25 ///

1 **3) Respondents cannot show estoppel is appropriate otherwise.**

2 Aside from the above mentioned requirements, Respondents must
3 establish 1) CalPERS was apprised of the facts 2) CalPERS intended or reasonably
4 believed that claimant would act in reliance on its conduct 3) Respondents were
5 ignorant of the true state of facts 4) Respondents actually and reasonably relied on the
6 conduct of the party to be estopped to their detriment. (*Mansell*, 3 Cal. 3d 462, 489.)
7 For estoppel against a government entity, a fifth element – the interest of private
8 parties must outweigh any effect on public interest and policies - mentioned above,
9 must also be present. *Id.* at 496-97. The party attempting to assert the doctrine must
10 affirmatively establish each of its elements. (*McCoy v. Board of Retirement* (1986) 183
11 al. App. 3d 1044, 1051.) Respondents fail to meet their burden.

12 i. Respondents fail to demonstrate that CalPERS was apprised of the facts.

13 The first element requires proof of actual knowledge or "careless and culpable
14 conduct resulting in the deception of the party entitled to claim the estoppel."
15 *Pleasanton*, 211 Cal. App. 4th 543; citing *Banco Mercantil v. Sauls Inc.* (1956)
16 140 Cal. App. 2d 316, 323.)

17 There is no evidence demonstrating Respondent's contention that CalPERS
18 was aware of the "true facts involving the Respondents and the terms of their
19 retirement." (RAC 10:26-28.) CalPERS never made any statements to
20 Respondents and Respondents failed to present the direct testimony of City staff,
21 whom they claim spoke to CalPERS. (RAC 10:26-29.) Respondents failed to
22 establish who the CalPERS representative was, which unit they worked in,
23 whether they had authority to bind CalPERS, whether they were acting within
24 that authority, when the CalPERS representative spoke to the City staff, the
25 exact information provided by City staff, or the exact representations made by the

1 CalPERS representative. Respondents do not even provide enough information
2 to allow CalPERS to counter their allegations of actual knowledge.

3 Respondents presented the testimony of Senator Roth, who testified that
4 he heard a conversation between the City staff and someone whom he thought
5 was from CalPERS. The testimony fell short of establishing actual knowledge.
6 Senator Roth could not recall who the CalPERS representative was, which
7 department they worked in, or whether they had any authority to answer such
8 questions. (Transcript 87:18-25, 88:1-23, 89:16-17.) Senator Roth could not
9 elaborate on exactly what the representative stated, other than to say the
10 Settlement agreement was "acceptable" to the representative. (Transcript 87:18-
11 25, 88:1-23, 89:16-17.)

12 It is also unclear whether the representative was apprised of all of the facts
13 involved in this case. It is entirely possible that some of the important facts were
14 not communicated to the representative. Of course, we cannot confirm any of
15 this information, as Respondents were not present, CalPERS has no record of
16 such a conversation, and the City staff, who may have more knowledge of the
17 details, were not summoned by Respondents.

18 Furthermore, it is unclear whether the City staff actually spoke to a
19 Retirement Program Specialist (RPS), such as Samuel Camacho, who would
20 have the expertise and authority to discuss the issues presented. Respondents
21 provide little to no details concerning the alleged representations and fail to
22 demonstrate that a CalPERS representative with the appropriate authority was
23 apprised of all of the complex facts involved in this case.

24 ///

25 ///

1 **ii. Respondents fail to demonstrate that CalPERS intended or reasonably**
2 **believed that Respondents would act in reliance of its conduct.**

3 Respondents refer to Mr. Camacho's testimony to support their contention that
4 CalPERS intended or reasonably believed that Respondents would act in reliance of
5 its conduct. (RAC pp. 11& 12.) Mr. Camacho testified concerning the assistance
6 provided by the RPS staff, to the local entities, in response to specific questions posed
7 by the local entities assigned to them. (Transcript 128:9-25, 129:1-3.) Respondents
8 took Mr. Camacho's testimony concerning the role of RPS staff from the Final
9 Compensation Unit and attempted to apply it generally to CalPERS, even though the
10 representative the City spoke to may not have been a retirement specialist from the
11 Final Compensation Unit.

12 Respondents also omit the fact that Mr. Camacho testified that based on his
13 department's relationship with the local entities and disclaimers given, the staff from
14 the local entities is aware that the information provided by a RPS is not the final
15 determination. (Transcript 129:16-25, 130-131, 132:1-9.)

16 Furthermore, Respondents fail to offer sufficient proof demonstrating the CalPERS
17 representative the City spoke to actually represented that his or her statements should
18 be relied on. For all we know, the CalPERS representative may have informed the City
19 that the information provided was not a final determination.

20 **iii. Respondents fail to demonstrate they were ignorant of the true state of facts.**

21 Respondents clearly knew they were retiring as Lieutenants. The Settlement
22 specified they would be retired as Lieutenants and Respondents also represented to
23 CalPERS that they were Lieutenants. (Exhibit 7, p. 2:7-10, Exs. 9 &10.) Other than
24 now testifying to the contrary, Respondents fail to offer any evidence to support their
25 belief that they were retiring as Captains.

1 As to the City, it was not ignorant of the true state of facts. As in *Pleasanton*,
2 section 20636, and Cal. Code Regs. §570 and past dealings with CalPERS should
3 have put the City on notice that the increase in pay might not be pensionable.
4 (*Pleasanton*, Cal. App 4th at 544.)

5 iv. Respondents' reliance was unreasonable.


6 As mentioned above, Respondents never spoke to CalPERS regarding
7 the Settlement agreement, nor were they present during any conversations between
8 the City and CalPERS. Senator Roth testified that he specifically informed
9 Respondents' attorney to conduct his own independent research into the matter.
10 (Transcript pp. 98:4-13, 18-22.) Hurt and Bacon's reliance on Senator Roth's
11 statements regarding a conversation between the City and someone from CalPERS is
12 unreasonable considering Senator Roth clearly informed Respondents' attorney to
13 investigate the matter further. (Transcript p.98:4-13, 18-22.)

14 **CONCLUSION**

15 Respondents' increase in pay was pursuant to a settlement agreement in
16 exchange for retiring from their positions as Lieutenants. Respondents were never
17 promoted and never performed the duties of a Captain. CalPERS has no authority to
18 consider the final settlement pay as compensation earnable. Thus, CalPERS
19 determination should be upheld.

20 Respectfully submitted,

21
22 Dated: 9/28/15


PREET KAUR, STAFF ATTORNEY
Attorney for California Public Employees'
Retirement System

Attachment 1

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Summary Financials Retirement Contract Health Contract Agreements Mergers and Reorganizations Reports

Common Tasks

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 Merger History
 Maintain CBU

Name: City of Riverside **CalPERS ID:** [REDACTED]

Benefit Summary [View More Actions](#)

Member Category	Number of Benefit Levels	Merger	Additional Benefits
<input type="checkbox"/> Miscellaneous	(3)	Yes	Yes
<input type="checkbox"/> Safety - Fire	(4)	No	Yes
<input checked="" type="checkbox"/> Safety - Police	(4)	No	Yes

[Display Benefit Levels](#)

Benefit Levels

Benefit Level	Enroll Effective Date	Formula	Member Rate	SSA	Contribution Modification	Pooled	Rate Plan Identifier	Status
<input type="radio"/> First Level - Police	07/01/1945	3% @ 50	9.0	None		No	30207	Active
<input checked="" type="radio"/> Second Level - Police	01/01/1983	3% @ 50	9.0	None		No	30209	Active
<input type="radio"/> Third Level - Police	06/13/2012	3% @ 50	9.0	None		No	30211	Active
<input type="radio"/> PEPR New Members - Police	01/01/2013	2.7% @ 57	12.25	None		No	25065	Active

[Display Benefit Provisions](#)

Provision Details

This page lists the benefit provisions effective for selected member category during the specified date range. You can use the **Effective As Of Date** Textbox and **Display** Button to view different date ranges of effective provisions.

Effective As Of Date: Provision Type: [View All](#)

Provision Type	Provision Name	Government Code Section	Effective Begin Date	Effective End Date	Source
SR Benefit Formula	3% @ 50 Patrol or Local Safety Member	Section 21362.2	12/17/2004		Contract
Death Benefits	Pre Retirement Death Benefits to continue after remarriage of survivor	Section 21551	01/01/2000		Contract
1959 Survivor Benefit Level	1959 Survivor Benefit Level 3	Section 21573	07/14/1998		Contract
Post Retirement Survivor Allowance	Post-Retirement Survivor Allowance to Continue After Remarriage	Section 21635	09/19/1986		Contract
Allowance Increases	Combined Increase	Section 21325.6	01/13/1984		Contract
Final Compensation Period	Final Compensation 1 Year	Section 20042	01/13/1984		Contract
Post Retirement Survivor Allowance	Post-Retirement Survivor Allowance	Section 21624/21626	01/01/1983		Contract
Death Benefits	\$500 Retired Death Benefit	Section 21620	01/01/1983		Contract
Military/Relocation Credit	Military Service Credit as Public Service	Section 21024	01/01/1983		Contract
Cost of Living Allowance	2% Annual Cost-of-Living Allowance Increase	Section 21329	01/01/1983		Contract
Prior Service	Prior Service	Section 20055	01/01/1983		Contract

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- View Rates
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Benefit Summary **View More Actions**

Member Category	Number of Benefit Levels	Merger	Additional Benefits
<input type="checkbox"/> Miscellaneous	(3)	Yes	Yes
<input type="checkbox"/> Safety - Fire	(4)	No	Yes
<input checked="" type="checkbox"/> Safety - Police	(4)	No	Yes

[Display Benefit Levels](#)

Benefit Levels

Benefit Level	Enroll Effective Date	Formula	Member Rate	SSA	Contribution Modification	Pooled	Rate Plan Identifier	Status
<input checked="" type="radio"/> First Level - Police	07/01/1945	3% @ 50	9.0	None		No	30207	Active
<input type="radio"/> Second Level - Police	01/01/1983	3% @ 50	9.0	None		No	30209	Active
<input type="radio"/> Third Level - Police	06/13/2012	3% @ 50	9.0	None		No	30211	Active
<input type="radio"/> PEPR New Members - Police	01/01/2013	2.7% @ 57	12.25	None		No	25065	Active

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Military/Relocation Credit	Military Service Credit as Public Service	Section 21024	12/12/1975		Contract
Post Retirement Survivor Allowance	Post-Retirement Survivor Allowance	Section 21624/21626	12/29/1972		Contract
Cost of Living Allowance	2% Annual Cost-of-Living Allowance Increase	Section 21329	04/01/1971		Contract
Death Benefits	\$500 Retired Death Benefit	Section 21620	12/01/1969		Contract
Prior Service	Prior Service	Section 20055	07/01/1945		Contract

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PROOF OF SERVICE

I am employed in the County of Sacramento, State of California. I am over the age of 18 and not a party to the within action; my business address is: California Public Employees' Retirement System, Lincoln Plaza North, 400 "Q" Street, Sacramento, CA 95811 (P.O. Box 942707, Sacramento, CA 94229-2707).

On September 28, 2015, I served the foregoing document described as:

CalPERS' REPLY BRIEF- In the Matter of the Calculation of Final Compensation of TIMOTHY BACON, Respondent, and DARRYL HURT, Respondent, and CITY OF RIVERSIDE, Respondent. ; Case No. 2012-0191; OAH No. 2014090781.

on interested parties in this action by placing ___ the original XX a true copy thereof enclosed in sealed envelopes addressed and/or e-filed as follows:

Joseph Bolander
Gaspard Castillo Winter Harper, APC
3333 Concourses Street, Bldg. 4, Suite 4100
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(Via Overnight Mail and Via E-mail:
joe@gcwhlaw.com)

Office of Administrative Hearings
San Diego
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(Via e-file:sanfilings@dgs.ca.gov)

Neil Okazaki
City of Riverside
3900 Main Street
Riverside, CA 92522
(Via Overnight Mail and Via Email:
nokazaki@riversideca.gov)

[XX] BY FEDEX OVERNIGHT MAIL -- As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Sacramento, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing an affidavit.

[XX] BY ELECTRONIC TRANSMISSION: I caused such document(s) to be sent to the addressee(es) at the electronic notification address(es) above. I did not receive within a reasonable time of transmission, any electronic message, or other indication that the transmission was unsuccessful.

Executed on September 28, 2015, at Sacramento, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Adriana Reagin
NAME


SIGNATURE